PETITION AND TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 319

THE UNITED STATES, PETITIONER

vs.

ACME OPERATING CORPORATION; LIBERTY TRUST COMPANY, INTERVENOR

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Petition for certiorari filed August 24, 1932
Certiorari granted October 17, 1932

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ACME OPERATING CORPORATION; LIBERTY TRUST COMPANY, INTERVENOR

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1 In the Supreme Court of the United States

October term, 1932

No. 319

THE UNITED STATES, PETITIONER

v.

ACME OPERATING CORPORATION, LIBERTY TRUST COMPANY, intervenor

Petition for a writ of certiorari to the Court of Claims

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above case rendered February 8, 1932 (not yet reported).

JURISDICTION

The judgment of the court was rendered on February 8, 1932. Motions for new trial were overruled on June 15, 1932. The jurisdiction of this court is invoked under section 3 (b) of the act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Court of Claims has jurisdiction of a claim by a mortgagee not entitled to possession for alleged injuries by the United States to ships which it had requisitioned from the mortgagors.

2. Whether a mortgagee may recover against a third party for alleged injuries to the mortgaged property which are not shown to have been wrongfully inflicted.

3. Whether a mortgagee may recover for alleged injuries to the mortgaged property which do not impair its security.

2 4. Whether the Court of Claims has jurisdiction of a claim for alleged injuries to property when there are no allegations of fact in the petition upon which to base such a claim.

STATUTE INVOLVED

Section 145 of the Judicial Code (U. S. C., title 28, sec. 250) provides in part as follows:

"The Court of Claims shall have jurisdiction to hear and determine the following matters:

"First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for dam-

ages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable. * * *"

STATEMENT

This was a suit by the Acme Operating Corporation for just compensation alleged to be due it as charterer of two vessels, the use of which was requisitioned by the Government. The Liberty Trust Company intervened, asserting a right to a substantial part of any recovery by the Acme Operating Corporation, as well as setting up claims of its own. The facts are very complicated and the findings of the court occupy 20 pages. The facts relevant to the issues here presented may be summarized as follows:

3 The two ships in question, the S. S. "J. S. Whitney" and the S. S. "H. M. Whitney," were owned, respectively, by the Acme Steamship Corporation and the Whitney Steamship Corporation, of New York. The S. S. "J. S. Whitney" was subject to a mortgage of $150,000 held by the Fidelity Trust Company of Boston, Massachusetts (predecessor in interest of the intervenor), and the S. S. "H. M. Whitney" was subject to a mortgage of $200,000 held by the same company. (Findings 2, 6, 13, 22.) The Acme Operating Corporation (the plaintiff), a corporation organized under the laws of New York, chartered the ships from the owners on January 7, 1918. (Findings 12, 13.) About the same time the two vessels were placed in the yards of construction companies for enlargement and repair. Work was completed on April 10, 1918, in the case of the S. S. "H. M. Whitney," and shortly after April 27, 1918, in the case of the S. S. "J. S. Whitney." Part of the cost of this work was paid, leaving a balance of $132,509.45 due on the S. S. "J. S. Whitney" and of $253,640.63 on the S. S. "H. M. Whitney." (Findings 8, 9.)

Pursuant to authorization conferred by the act of June 15, 1917 (40 Stat. 182), and Executive order, the Government requisitioned the two ships on April 27, 1918. (Findings 1, 16, 18, 19.) At about the same time both ships were arrested by United States marshals under libels filed by the construction companies to recover the balances due them, and were subsequently released to the Government by orders of court. (Findings 18, 19.)

4 On August 12, 1918, the Government and the owners of the ships (Acme and Whitney Steamship Corporations) executed a contract with respect to the ships, to which the Fidelity Trust Company was a party. This contract is annexed to the intervening petition and is made a part of finding 22 by reference. It provided that expenditures by the Government in behalf of the owners, for shipment of the cargoes which were in the ships at the time of requisition, should be repaid to the Government out of the sums due the owners as just compensation for the use of the ships.

If the just compensation exceeded the debt to the Government, the excess was to be applied to the payment of the mortgages and liens on the ships; but if the just compensation was less than the sum due the Government, it was to have a lien on the ships, to the extent of the difference, superior to the mortgage liens of the Fidelity Trust Company.

In December, 1918, requisition charter parties between the Government and the owners of the ships were executed on the standard form as of the dates of the requisitions. The charter parties provided that the owners accepted them in full satisfaction of any claims they might have against the Government arising from the requisitions. (Finding 22.) The S. S. "H. M. Whitney" remained in the Government service until December 26, 1918, and the S. S. "J. S. Whitney" until May 22, 1919, on which respective dates the ships were placed in New York Harbor, where they remained until returned to their owners. (Finding 21.)

On June 30, 1919, the owners of the ships agreed to deliver
5 them to a representative of the Fidelity Trust Company to be operated for the latter's benefit. They then notified the Government of their readiness to accept the return of the ships. As they were in need of repairs, it was agreed between the Government and the owners that the vessels should be surveyed for the purpose of ascertaining the cost of placing them in satisfactory condition. The vessels were delivered to the owners early in July, 1919. (Finding 28.) At that time the value of the ships in good repair was $482,000 for the S. S. "J. S. Whitney" and $436,000 for the S. S. "H. M. Whitney." (Finding 32.) The survey took place in the last week of July, 1919, and the cost of reconditioning the vessels was fixed at $87,706.84, which sum the Government credited to the owners of the ships. (Finding 28.)

In order to prevent the proceedings which had been begun by the construction lienors in 1918 from proceeding to sale of the vessels, the Fidelity Trust Company entered into agreements for the purchase of their claims on August 5, 1919, pursuant to which it later received an assignment of all of one claim and of the greater part of the other. (Finding 29.)

The ships had been placed in dry dock for repairs and reconditioning by their owners shortly after the Government returned them in July, 1919. After the completion of this work on August 29 and September 30, 1919, respectively, they were removed by the Fidelity Trust Company's representative. The Trust Company paid $55,377.26 "for sundry services and materials" in connection with the S. S. "J. S. Whitney" and $81,087.50 "for sundry services and materials" in connection with the S. S. "H. M. Whitney." These
6 sums were charged to the owners of the ships. Most of this money was spent "for direct repairs," but $7,165 of it was not spent for repairs or reconditioning worn portions of the ships. (Finding 24.)

In September, 1920, the Fidelity Trust Company became financially embarrassed and was taken over by the Massachusetts commissioner of banks; and in April, 1921, its assets were transferred to the present intervenor. (Finding 29.)

A final accounting between the owners of the ships and the Government (not completed until 1926), which included the credit to the owners of the sum of $87,706.84 which had been fixed by the board of survey as the cost of reconditioning the ships, showed a balance still owing to the Government of $77,068.54. This accounting was correct. (Finding 33.)

The claim of the plaintiff was based upon its right as charterer of the vessels from their owners. This contention was disposed of by the court on the grounds, among others, that at the time the ships were requisitioned the plaintiff neither had nor was entitled to their possession, and that the plaintiff and the owners of the ships, all of which were controlled by the same persons, were alter egos, so that payment of just compensation to the owners was payment to the plaintiff. With this branch of the case we are no longer concerned.

7 The intervenor sought recovery as assignee of the mortgages and construction liens. It alleged that its predecessor had been prevented from foreclosing the mortgages as a result of the requisition, and that since the ships had no market value at the time they were released from requisition, the security for the mortgages had been rendered worthless. Its petition concluded with a prayer for "such further and other relief" as it might be entitled to. The court gave judgment in favor of the intervenor for $129,299.76, with interest at 6 per cent from October 1, 1919, to February 8, 1932.

The opinion of the court with respect to the claim of the intervenor is difficult to follow. The court states that the case necessitates "the determination of a new principle for which [it found] no direct precedents in the authorities." It says that since the intervenor's predecessor was not entitled to possession of the ships at any time between the dates of requisition and release from Government service it could not recover compensation for the taking and therefore had no claim for the depreciation in market value. The court proceeded, however, to give judgment to the intervenor for the sum of $129,299.76, which it had found was expended by the intervenor's predecessor "for direct repairs" in reconditioning the vessels after their release from requisition. (See Finding 24.) It said that the Government was liable to someone for damage done the vessels, and that the Government's credit to the ship owners of the cost of reconditioning the ships did not protect it as against the intervenor's

8 predecessor. The court analogized the case to that of a mortgagee not in or entitled to possession, who may recover against a third person for injuries to his interest in the mortgaged property. Although recognizing that this rule applies only where the third person acts wrongfully, and that the action of the Government in taking possession of the ships in this case was not wrongful, the court said that the same principle applied. It hurdled the diffi-

culty that such a claim had not been pleaded by saying that the matter had been argued by the parties without objection and that the broad prayer for relief was sufficient to include this claim, and concluded by allowing recovery of repairs necessary to restore the vessels to their condition when requisitioned by the Government, although a substantial portion of the "repair" was not found to be necessary for this purpose and was merely assumed to be so in the opinion.

ASSIGNMENTS OF ERROR

1. The court erred in taking jurisdiction of a claim for damages sounding in tort.
2. The court erred in permitting the intervenor to recover without a showing that the alleged injuries to the mortgaged property were wrongfully inflicted.
3. The court erred in permitting the intervenor to recover despite the fact that the alleged injuries had not impaired the mortgage security.
9 4. The findings of the court do not support the judgment, since they do not disclose the character, purpose, or necessity of the expenditures for which recovery was had, or that these expenditures were made necessary by any act of the Government.
5. The court erred in taking jurisdiction of a claim which was not pleaded.
6. The court erred in giving judgment for the intervenor.

10 REASONS FOR GRANTING THE WRIT

The decision of the court below seems erroneous; and in its determination of the "new principle for which [it found] no direct precedents in the authorities" the court so far departed from the usual and accepted course of judicial procedure as to require the exercise by this court of its supervisory powers of review. The effect of the determination of the "new principle" was to eliminate the following basic essentials of the intervenor's cause of action:

(1) Section 145 of the Judicial Code, supra, which defines the jurisdiction of the Court of Claims, expressly excludes cases sounding in tort; and it is now settled that the jurisdiction of that court depends upon contract, express or implied in fact. (Alabama v. United States, 282 U. S. 502; Pearson v. United States, 267 U. S. 423, 427; Klebe v. United States, 263 U. S. 188; Keokuk & Hamilton Bridge Co. v. United States, 260 U. S. 125; Basso v. United States, 239 U. S. 602.) In the present case the court has found neither an express contract nor an implied contract upon which to base the intervenor's claim for damages. On the contrary, the court expressly holds that since the intervenor's predecessor was not entitled to possession of the ships at any time between the dates they were requisitioned and released, the Government took nothing from it (Opinion, pp. 31–32.) From this it seems clear that there was no

privity between the intervenor's predecessor and the Government. (Cf. Robins Dry Dock Co. v. Flint, 275 U. S. 303.) It is noteworthy that the cases to which the court analogized this one were tort cases, and the court speaks of the claim as one for "an injury," which implies tortious conduct. Indeed, the claim of a
11 mortgagee not entitled to possession for injury to the mortgaged property must necessarily be based on tort. (See cases cited infra under (2).)

(2) The decision of the court below is in conflict with the great weight of authority, which is to the effect that a mortgagee not in or entitled to possession may not maintain an action against a third person for a taking of or injury to the mortgaged property unless the taking or other injury was wrongful. This was the situation in both cases cited by the court. (George Adams, etc., Co. v. National Bank, 123 Fed. 641 (C. C. A. 8th); O'Brien v. Miller, 117 Fed. 1000 (C. C. D. Conn.). See also Morgan v. Gilbert, 2 Fed. 835 (C. C. W. D. Mich.); Clapp v. Spokane, 53 Fed. 515, 517 (C. C. D. Wash.); Jones on Mortgages (8th ed.), §§ 851, 859, and cases cited.) There is no finding in the present case that the repairs for which the intervenor's predecessor paid were necessitated by wrongful treatment of the ships. The court holds expressly that the action of the Government in taking possession of the ships was lawful. Certainly use of the ships which would subject them to ordinary wear and tear would be one of the incidents of such rightful possession. The opinion and finding 24 disclose that recovery has been had for "repairs" not shown to have been made necessary unless by ordinary wear and tear, which may perhaps be assumed. It is common knowledge that such repair or reconditioning is necessitated by ordinary use of ships. While the Government's obligation to pay just compensation to the owners of the ships
12 for their use, or the charter parties between the owners and the Government, may have imposed the duty of replacing the ships in good condition upon their return, the court has found that all the Government's obligations to the owners were satisfied. (Finding 33.) The accounting between the Government and the owners included a credit to them of the $87,700 fixed by the Board of Survey as the cost of reconditioning the ships. (Findings 28, 33.) In the absence of contract, there would seem to be no duty by the Government to pay the cost of repairs necessitated by ordinary use to a mortgagee which was neither in nor entitled to possession of the ships when they were requisitioned. But the only contract between the Government and the intervenor's predecessor was that of August 12, 1918, by which it was agreed that all sums found to be due from the Government for use of the ships should be credited against the debts of the owners to the Government before any payment to mortgagees or other lienors. (Finding 22.)

(3) The decision of the court below is in conflict with the weight of authority, which is to the effect that a mortgagee not in or en-

titled to possession may recover for injuries to the mortgaged property only when such injuries impair its security. This limitation is expressed by the cases cited by the court. (George Adams, etc., Co. v. National Bank, supra, 123 Fed. 641, 645; O'Brien v. Miller, supra, 117 Fed. 1000. See also McGahan v. Bank, 156 U. S. 218, 235; Union Trust Co. v. Woodrow Mfg. Co., 48 F. (2d) 194, 197 (C. C. A. 8th); Morgan v. Gilbert, supra, 2 Fed. 835; Clapp
13 v. Spokane, supra, 53 Fed. 515, 517; Jones on Mortgages, supra, §§ 846, 857, 858, 859, and cases cited.) When the Government returned the ships to their owners in July, 1919, they were together worth $918,000 in good condition. (Finding 32.) The liens then outstanding totaled about $750,000. (Finding 29.) Hence, even if we deduct from the value of the ships the $129,000 spent by the intervenor's predecessor in reconditioning them, they were still worth more than enough to cover all the outstainding liens. While a mortgagee apparently may recover for injuries to the mortgaged property under the law of Massachusetts without showing impairment of security, the basis for the rule is that in Massachusetts the mortgagee has title and a present right to possession. (See Morgan v. Gilbert, supra, 2 Fed. 835, 837–838; Sutherland on Damages (4th ed.), pp. 3837–3838.) The court below expressly held the Massachusetts rule inapplicable here, on the ground that the intervenor's predecessor was not entitled to possession of the ships at any time between the dates of requisition and release.

It should also be noted that the decision is open to question on two other grounds. The intervenor did not allege any facts upon which to base a claim for injury to the ships, and the decision on that ground came as a complete surprise to Government counsel. A motion for new trial was filed raising this point among others,
14 but it was overruled by the court without opinion. Moreover, the findings, which should be read in connection with the comments in the opinion upon the nature of the expenditures for which recovery has been had, are not sufficient to support the judgment, even upon the erroneous theory adopted in the court below, since, with respect to a substantial portion of these expenditures, it is not found that they were for repairs which were necessary to restore the vessels to their condition when requisitioned by the Government. (See Finding 24.)

CONCLUSION

The petition should be granted.
Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

AUGUST, 1932.

[Title and index omitted.]

15 In the Court of Claims of the United States

No. E-260

ACME OPERATING CORPORATION, PETITIONER

against

UNITED STATES OF AMERICA, RESPONDENT

I. *Petition*

Filed April 9, 1925

To the Honorable the Chief Justice and the Associate Justices of the United States Court of Claims:

Your petitioner, Acme Operating Corporation, respectfully represents:

I

Said Acme Operating Corporation is a corporation duly organized and existing under the laws of the State of New York.

16 II

Heretofore, to wit, in October and November, 1917, respectively, the American cargo steamships "James S. Whitney" and "Henry M. Whitney," neither of which was then able to carry as much as twenty-five hundred (2,500) tons total dead weight, including bunkers, water, and stores, were purchased from the Eastern Steamship Company by Robert E. Miller and Bartholomew L. Stafford as co-partners.

III

On or about the 3rd day of January, 1918, the said steamship "Henry M. Whitney" was duly transferred to the Whitney Steamship Corporation, a corporation duly organized and existing under the laws of the State of New York, and said corporation was the owner of said steamship at all subsequent times hereinafter mentioned.

IV

On or about the 5th day of January, 1918, the steamship "James S. Whitney" was duly transferred to the Acme Steamship Corporation, a corporation duly organized and existing under the laws of the State of New York, and said corporation was the owner of said steamship at all subsequent times hereinafter mentioned.

V

On or about the 5th day of January, 1918, said steamships "James S. Whitney" and "Henry M. Whitney" were duly chartered by the aforesaid respective steamship corporations to the aforesaid Robert E. Miller and Bartholomew L. Stafford under charter parties and agreements providing for the reconditioning of said two
17 steamships at very heavy expense and providing for the advance by the charterers of various sums required to pay the expenses of such reconditioning. Thereafter, and on or about the said 5th day of January, 1918, the said Robert E. Miller and said Bartholomew L. Stafford did transfer and assign to the aforesaid Acme Operating Corporation the said charter parties of the said two steamships and said agreements and all their right, title, and interest thereunder.

VI

Said Acme Operating Corporation, acting under the aforesaid charter parties and agreements and other agreements of similar effect, immediately took possession of and managed and operated said two steamships, booked freights and made payments of very large sums of money on repair bills and other obligations of said two steamships, and extensive repairs and alterations were made by said Acme Operating Corporation to said two steamships as a result of which their dead-weight tonnage was greatly increased and they were duly classified by the American Bureau of Shipping as seaworthy and of the highest class for ocean-going service, and the American Bureau of Shipping issued its certificates and ocean insurance was granted accordingly.

VII

Pursuant to the aforesaid charter parties and agreements, and other agreements of similar effect, said Acme Operating Corporation, and its predecessors, paid out on account of, and advanced to, the owners of said two steamships very large sums of money sufficient to pay the charter hire thereof for a long period
18 of time, to wit, about two years from the time said Acme Operating Corporation took possession of said two steamships as aforesaid; and it was understood and agreed between said Acme Operating Corporation and the aforesaid owners of said two steamships that said Acme Operating Corporation was to have the possession, use, and control of said two steamships until the charter hire thereof should be sufficient to repay to said corporation the amount so advanced.

VIII

The aforesaid time charter parties to the said Acme Operating Corporation was verbally extended as aforesaid, such extensions

being confirmed by written memoranda and by prepayment of the charter hire by said Acme Operating Corporation in accordance with the terms of said charter parties, and said Acme Operating Corporation duly performed all of the terms and conditions of the said charter parties of the said two steamships and the aforesaid agreements on its part to be performed.

XI

Public Act No. 23, of the 65th Congress, House Resolution 3971, entitled "An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved June 15th, 1917, provides that:

"The President is hereby authorized and empowered, within the limits of the amounts herein authorized: (e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States, any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship."

19

The act further provides:

"Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph twenty, and section one hundred and forty-five of the Judicial Code."

The act also provides:

"The word 'person' shall include any individual, trustee, firm, association, company, corporation or contractor."

"The word 'ship' shall include any boat, vessel or submarine and the parts thereof."

X

That in pursuance of provisions of said act of June 15th, 1917, the President of the United States, on July 11th, 1917, issued an Executive order, as follows:

"By virtue of authority vested in me in the section entitled 'Emergency shipping fund' of an act of Congress entitled 'An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on

20

account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' approved June 15th, 1917, I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for ship construction.

"And I do further direct that the United States Shipping Board shall have and exercise all power and authority vested in me in said section of said act insofar as applicable to and in furtherance of the taking over of title or possession, by purchase or requisition of constructed vessels or parts thereof, or charters therein, and the operation, management, and disposition of such vessels, and of all other vessels heretofore or hereafter acquired by the United States. The powers herein delegated to the United States Shipping Board may, in the discretion of said board, be exercised directly by the said board or by it through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose.

"WOODROW WILSON.

"THE WHITE HOUSE, 11 July, 1917."

21 XI

That the United States Shipping Board on October 12th, 1917, by virtue of the provisions of the act of Congress of June 15th, 1917, and the Executive order of the President, dated July 11th, 1917, above recited, issued a requisition order as follows:

"The United States Shipping Board hereby gives notice to all owners of ships registered and enrolled under the laws of the United States that the requisition of all American steamers described below and of which previous announcement has been made, will become operative and effective on October 15th, 1917, at noon.

"1. The ships affected by said requisition and included therein are: (a) All cargo ships and tankers able to carry not less than 2,500 tons total dead weight, including bunkers, water, and stores; (b) all passenger steamers of not less than 2,500 tons gross register.

"2. (a) As to all steamers in or bound to American ports on October 15th, 1917, requisition becomes effective after discharge of inward cargo and ship is put in ordinary good condition.

"(b) As to steamers which have started to load their outward cargo, requisition becomes effective at noon on October 15th, 1917, and accounts as to hire and expenses will be adjusted from time steamer began to load.

"3. Steamers trading to and from American ports that have sailed on their voyage prior to October 15th, 1917, at noon, are to complete that voyage as promptly as possible and report for requisitioning.

"4. Steamers that are occupied in trades between foreign ports shall be requisitioned as of October 15th, 1917, at noon, and accounts adjusted accordingly.

22 "5. (a) Owners, whose steamers are operating in their regular trades, are to continue the operation of their steamers for account of the Government, as they have been doing for themselves, until they receive further instructions.

"(b) Owners, whose steamers are chartered to others, will apply to the Shipping Board for instructions regarding the future employment of said steamers."

XII

Shortly after the aforesaid repairs and alterations were made, as a result of which the tonnage of said two steamships was increased and they were duly classified as aforesaid, the United States, through the United States Shipping Board, pursuant to the aforesaid act of Congress and the aforesaid Executive order, did requisition the said steamship "James S. Whitney" on or about the 27th day of April, 1918, and did requisition the said steamship "Henry M. Whitney" on or about the 29th day of April, 1918, together with their respective engines, boilers, tackle, apparel, equipment, furniture, and all supplies on board, and did on said dates take physical possession thereof and put them in service other than that of the aforesaid owners and charterer.

At the time of the aforesaid requisition, the said steamship "Henry M. Whitney" was lying at New York fully loaded and ready to sail for Italy, and the said steamship "James S. Whitney" was lying at Charleston completing loading and repairs and about to sail en route from New York to Genoa, export licenses and war insurance having been granted on all cargo for both vessels.

XIII

At the time of the aforesaid requisition, the said steamship "James S. Whitney" was able to carry approximately 3,750 tons total
23 dead weight and her speed was 16½ knots, and she was of peculiar value for war-time service on account of her type, size, and speed, and there were no other steamships of similar type, size, and speed that could be obtained during the entire requisition period by her said owners and charterer to replace her, and had her said owners and charterer been permitted to continue to operate her, she would have earned in excess of four hundred and fifty thousand ($450,000) dollars per month net during all times from the date of requisition until her surrender hereinafter mentioned.

XIV

The average fair bare-boat charter hire in the open market for vessels of the nearest type, size, and speed to said steamship "James S. Whitney" was $9.00 per deadweight ton per month at the time when the said steamship was requisitioned and taken possession of by the said Shipping Board as aforesaid, and thereafter until said steamship was released from such requisition.

XV

At the time of the aforesaid requisition the said steamship "Henry M. Whitney" was able to carry approximately 3,800 tons total dead weight and her speed was 14½ knots, and she was of peculiar value for war-time service on account of her type, size, and speed, and there were no other steamships of similar type, size, and speed that could be obtained during the entire requisition period by her owners and charterer to replace her, and had her owners and charterer been permitted to continue to operate her, she would have earned in excess of four hundred and fifty thousand ($450,000) dollars per month net during all times from the date of requisition until her surrender hereinafter mentioned.

24

XVI

The average fair bare-boat charter hire in the open market for vessels of the nearest type, size, and speed to said steamship "Henry M. Whitney" was $9.00 per dead-weight ton per month at the time when the said steamship was requisitioned and taken possession of by the said Shipping Board, as aforesaid, and thereafter until said steamship was released from such requisition.

XVII

At the time that the said two steamships were requisitioned and taken possession of by the Shipping Board, as aforesaid, they had on board stores, fuel, and supplies of the fair and reasonable aggregate value of eight-two hundred eighty-seven and 25/100 ($8,287.25) dollars, the property of the said Acme Operating Corporation, which stores were taken over and appropriated by the said Shipping Board under said requisition.

XVIII

The said steamships "James S. Whitney" and "Henry M. Whitney" were retained by the Shipping Board continuously and used by it in service other than that of the said owners and charterer up to and until said steamship "James S. Whitney" was surrendered on or about July 10th, 1919, and until the said steamship "Henry M. Whitney" was surrendered on or about July 8th, 1919.

XIX

Neither the United States nor the United States Shipping Board, nor their agents or representatives, have made any payment or compensation whatsoever to your petitioner for the use of either of the aforesaid two steamships or for the aforesaid stores, fuel, and supplies taken or freights collected or monies paid.

XX

On or about the 23rd day of April, 1919, in good faith and without knowledge of the fact that such assignment was void under the statutes of the United States, your petitioner did assign all its right, title, and interest in this claim to the Acme Steamship Corporation and Whitney Steamship Corporation, respectively; but your petitioner is bringing this suit upon the assumption that such assignment so made is absolutely void as against the United States Government and that under the decisions of the Supreme Court of the United States, it is, notwithstanding such assignment, entitled to maintain this action.

XXI

By reason of the foregoing, there became due from the Government of the United States to the petitioner the following sums:

Fuel and supplies taken	$8,287.25
Charter hire S/S James S. Whitney, speed 16½ knots (3,750 DWT., at $9 per month, $33,750), 6.30 p. m., April 27th, 1918, to April 23rd, 1919, 11 months, 27 days	401,575.00
Charter hire S/S Henry M. Whitney, speed 14½ knots (3,800 DWT., at $9 per month, $34,200), 1 p. m., April 29th, 1918, to April 23rd, 1919, 11 months, 25 days	404,700.00
	814,562.25

XXII

Your petitioner has made claim against the United States, through the United States Shipping Board, for the just compensation herein claimed; and the United States Shipping Board has disallowed and refused to pay your petitioner's said claim; no action thereon has been taken by Congress or any department except as hereinbefore stated; no person, other than your petitioner, is the owner of the said claim, or of any part thereof; no assignment or transfer of said claim, or of any part thereof or of any interest therein, has been made by your petitioner except as above stated; your petitioner is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the claimant and said Robert E. Miller and Bartholomew L. Stafford are citizens of the United States and have at all times borne true allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

XXIII

Your petitioner has not pending in any other court any suit or process against any person whatever for or in respect to the said claim against the United States, or any part thereof.

XXIV

This action is brought pursuant to the act of June 15th, 1917 (chapter 29, section 11), and acts amendatory thereof, and pursuant to the Revised Statutes (section 1072) and the Judicial Code of the United States, being act of March 3rd, 1887 (chapter 359), and act of March 3rd, 1911 (chapter 231), and acts amendatory thereof.

27

XXV

Your petitioner therefore prays judgment and decree of this honorable court against defendant, United States, for the sum of eight hundred and fourteen thousand five hundred sixty-two and 25/100 ($814,562.25) dollars or such other amount as will be just compensation to your petitioner for the taking of said vessels, monies, fuel, stores, and supplies by defendant, United States, as aforesaid.

ACME OPERATING CORPORATION,
By BARTHOLOMEW L. STAFFORD,
President.

[*Duly sworn to by Bartholomew L. Stafford; jurat omitted in printing.*]

28

II. *General traverse*

Filed June 8, 1925

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

HERMAN J. GALLOWAY,
Assistant Attorney General.

A. C.

III. *History of proceedings*

On December 17, 1925, Messrs. Howe & Bradley filed a motion to intervene by Liberty Trust Company.

On January 8, 1927, the plaintiff filed an answer to the motion to intervene.

On February 4, 1927, the court allowed the motion to intervene subject to objection by any party in interest.

On February 4, 1927, the Liberty Trust Company filed its petition as intervenor.

On June 28, 1928, on motion made therefor, the intervenor filed an amended petition.

Said amended intervening petition is as follows:

29 IV. *Amended intervening petition of Liberty Trust Company*

Filed June 28th, 1928

To the Honorable Chief Justice and Associate Judges of the United States Court of Claims:

The petitioner, Liberty Trust Company, respectfully represents:

I

The petitioner, Liberty Trust Company, is a banking corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, having a usual place of business in Boston.

II

In October and November, 1917, Robert E. Miller and Bar-
30 tholomew L. Stafford, hereinafter referred to as Miller and Stafford, purchased from the Eastern Steamship Company the American cargo steamships "James S. Whitney" and "Henry M. Whitney." Miller and Stafford were represented in these transactions by one Allan S. Farwell, of Ashland, Massachusetts, to whom the title to above-mentioned vessels was transferred.

III

Fidelity Trust Company, a banking corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, having a usual place of business in Boston, loaned to said Farwell the sum of one hundred fifty thousand dollars ($150,000.00) upon Farwell's promissory note dated October 30, 1917, secured by mortgage, on the steamship "James S. Whitney," dated October 30, 1917, and recorded in the office of the collector of customs at Boston in book 348, page 157, and in the office of the collector of customs at New York in book 17–M, page 269.

IV

Said Fidelity Trust Company loaned to Farwell a further sum of two hundred thousand dollars ($200,000.00) upon Farwell's promissory note dated December 4, 1917, secured by mortgage, on the steamship "Henry M. Whitney," dated December 4, 1917, and re-

corded in the office of the collector of customs at Boston in book 348, page 162, and in the office of the collector of customs at New York in book 17–M, page 280.

V

The "James S. Whitney" and the "Henry M. Whitney"
31 were on October 30, 1917, and on December 4, 1917, respectively, conveyed by the said Farwell to Robert E. Miller and Bartholomew L. Stafford as co-partners, the record title being taken in each case in the name of Bartholomew L. Stafford on behalf of himself and his co-partner. Simultaneously with each conveyance, the title to each of the ships was then conveyed to Arthur A. Miller as the nominee of the Equitable Trust Company, of New York. All of the conveyances were made subject to the respective mortgages referred to in Articles III and IV hereof.

VI

Miller and Stafford caused to be organized under the laws of the State of New York three corporations, to wit, the Whitney Steamship Corporation, the Acme Steamship Corporation, and the Acme Operating Corporation. Subsequently the Whitney Steamship Corporation acquired title to the "Henry M. Whitney," and the Acme Steamship Corporation acquired title to the "James S. Whitney." Your petitioner is informed and believes and therefore alleges that the stock ownership and control of the three corporations named in the next preceding paragraph of this article was in Miller and Stafford from the dates of their respective organization in December, 1917, until April 23, 1919, when Robert E. Miller assigned all his stock in Acme Operating Corporation to Claude T. Stafford as the nominee of Bartholomew L. Stafford.

VII

The United States, by and through the United States Shipping
Board, on or about April 27, 1918 (acting under authority of
32 the act of June 15, 1917 (c. 29, 40 Stat. 182), and the President's Executive order of July 11, 1917), requisitioned the steamship "James S. Whitney" in Charleston, South Carolina.

At about the time the "James S. Whitney" was requisitioned, as aforesaid, a libel in rem for the sum of one hundred thirty-two thousand five hundred nine and 45/100 dollars ($132,509.45) was filed in the District Court of the United States for the Eastern District of South Carolina against the ship by the Valk & Murdock Company, of Charleston, South Carolina, for repairs done, labor performed, and materials furnished.

The Shipping Board, by its counsel, appeared specially and made application that the vessel be released from the jurisdiction of the court and delivered over to the United States upon the ground that

at the time of the issuance of the warrant of attachment in the libel proceeding the vessel had been requisitioned by the United States. An interlocutory order was issued May 18, 1918, in which the court, after reciting the provisions of the act of June 15, 1917, supra, relative to the payment of compensation by the United States for vessels requisitioned, ordered and decreed that in order to protect the rights of parties having prior liens upon the vessel and who had come into court to have them adjudicated, the amount to be paid (by the United States) for the use of the vessel should be treated as and in lieu of the vessel itself, and that the libellants were entitled in priority to the owners to any sum or sums to be paid on account of the requisition of the vessel. On May 27, 1918, the cause came on further to be heard and an order was entered directing that the "James S. Whitney" be delivered to the United States Shipping Board.

33 VIII

The United States Shipping Board, on or about April 29, 1918 (acting under the authority of the act of June 15th, 1917, and the President's Executive order, supra), requisitioned the steamship "Henry M. Whitney" in New York.

At about the time the "Henry M. Whitney" was requisitioned, as aforesaid, a libel in rem for the sum of two hundred sixty thousand one hundred forty-nine and 87/100 dollars ($260,149.87) was filed in the District Court of the United States for the Eastern District of New York against the ship by Theodore A. Crane's Sons Company for repairs done, labor performed, and materials furnished.

The Shipping Board, by its counsel, appeared before the court and stated that the vessel was needed by the Government for war purposes and requested that it be released from the jurisdiction of the court. On May 29, 1918, the court entered the following order: That the United States marshal (who had the custody of the vessel by virtue of certain writs of attachment in the libel proceeding) appoint the master of the ship a special deputy United States marshal; that said deputy remain in possession of the vessel in behalf of the marshal; that the vessel, in his custody, be turned over to the Shipping Board for purposes connected with the war; that the special deputy marshal or his substitutes remain always in possession; and that the vessel be returned to the custody of the marshall upon being released from requisition by the Shipping Board.

34 IX

At the time the "James S. Whitney" and the "Henry M. Whitney" were requisitioned, as aforesaid, certain cargoes (on which the freight had been prepaid by the owners thereof) had been

shipped aboard the vessels consigned to Genoa, Italy. On August 12, 1918, a written contract (a copy of which is annexed hereto) was entered into between the United States Shipping Board (on behalf of the United States of America), Whitney Steamship Corporation and Acme Steamship Corporation (as the owners of the vessels), certain owners of the cargoes shipped, as aforesaid, and Fidelity Trust Company (as the holder of mortgages on the vessels); under the terms of the contract the United States agreed to pay just compensation for the requisition of the vessels and to forward the cargoes to their destinations; the owners of the vessels, namely, the Whitney Steamship Corporation and the Acme Steamship Corporation, agreed to pay to the United States the sum of one hundred eighty-seven thousand dollars ($187,000.00) as part payment for the forwarding the cargoes, as aforesaid; from the amount to become due on account of the requisition of the vessels it was further agreed that the United States should retain a sufficient amount to pay the balance due it for forwarding the cargoes; and that the claim of the United States for forwarding the said cargoes should be prior to the mortgages of Fidelity Trust Company and the liens of the cargo owners; and—

"In the event of the party of the first part (United States) fully reimbursing itself out of the compensation due for the requisitioning of said steamers, or either of them, for the aforesaid
35 compensation for the carrying of said cargo forward to destination, the said expenses, the said forwarding costs, and interest thereon, the party of the first part (United States) shall have the right to apply any further compensation which shall become due for the requisitioning of said steamers to the payment of any mortgages, and/or just claims constituting liens on said steamers, or either of them."

X

The "James S. Whitney" was released from requisition in July, 1919. Fidelity Trust Company, at the request of the Whitney Steamship Corporation and the Acme Steamship Corporation, and in order to permit the private operation of the ship and to protect its interest as mortgagee, on September 20, 1919, purchased the above-mentioned lien of the Valk & Murdock Company on the "James S. Whitney" for one hundred forty-five thousand two hundred sixty-three and 48/100 dollars ($145,263.48).

XI

The "Henry M. Whitney" was released from requisition in July, 1919. The Theodore A. Crane's Sons Company, on August 16, 1918, obtained a judgment in the aforesaid libel proceedings for the sum of two hundred sixty thousand one hundred forty-nine and 87/100

dollars ($260,149.87), plus interest of fifteen thousand one hundred seventy-five and 40/100 dollars ($15,175.40), making a total amount of two hundred seventy-five thousand three hundred twenty-five and 27/100 dollars ($275,325.27). Fidelity Trust Company, at the request of the Whitney Steamship Corporation and the Acme
36 Steamship Corporation, and to prevent the ship from being seized and sold to satisfy the aforesaid judgment, entered into a contract with the judgment creditor whereby Fidelity Trust Company was to pay the sum of seventy-five thousand dollars ($75,000.00) to the Theodore A. Crane's Sons Company and received an assignment of its judgment to the extent of the payment made and that Fidelity Trust Company would have the privilege of making such further payments as it wished at the same time receiving an assignment of the said judgment to the extent of the payments made. Fidelity Trust Company paid, on account of the judgment of the Theodore A. Crane's Sons Company, the sum of two hundred six thousand five hundred twenty-six and 10/100 dollars ($206,526.10) and received assignments of the judgment in that amount.

XII

In return for the payments on the judgment held by Theodore A. Crane's Sons Company and the lien of Valk & Murdock Company by Fidelity Trust Company, the mortgage note on the "James S. Whitney" of one hundred fifty thousand dollars ($150,000.00), given by Farwell as aforesaid, was endorsed by the Acme Steamship Corporation and the Whitney Steamship Corporation; and to protect further the Fidelity Trust Company, on account of the sums advanced on the aforesaid mortgages and in the payment of the aforesaid liens, the Acme Steamship Corporation gave to Fidelity Trust Company a further bond and mortgage of two hundred thousand dollars ($200,000.00) on the steamship "James S. Whitney."

37

XIII

In return for the payments on the judgment held by Theodore A. Crane's Sons Company, and the lien of Valk & Murdock Company by Fidelity Trust Company, the mortgage note of two hundred thousand dollars ($200,000.00) given by Farwell as aforesaid, was endorsed by the Acme Steamship Corporation and the Whitney Steamship Corporation; and to protect further Fidelity Trust Company on account of the sums advanced on the aforesaid mortgages and in the payment of the aforesaid mortgages and in the payment of the aforesaid liens the Whitney Steamship Corporation gave to Fidelity Trust Company a further bond and mortgage of one hundred fifty thousand dollars ($150,000.00) on the steamship "Henry M. Whitney."

XIV

On September 28, 1920, Joseph C. Allen, commissioner of banks for the Commonwealth of Massachusetts, acting under the provisions of chapter 399 of the Acts of 1910 of the Great and General Court of Massachusetts, and of all acts in amendment thereof and in addition thereto, for the purpose of protecting the interest of its creditors and stockholders, took possession of the property and business of Fidelity Trust Company.

XV

On March 26, 1921, Fidelity Trust Company, acting by and through said commissioner of banks, Joseph C. Allen, agreed to sell and convey (subject to the approval of the Supreme Judicial Court of Massachusetts) substantially all of its property, assets, and business to Liberty Trust Company.

38 As part of said agreement to sell there was executed an agreement and declaration of trust between Liberty Trust Company, a committee representing the stockholders of Fidelity Trust Company, and certain trustees in liquidation (herein referred to as "trustees"). The trust instrument provided that certain assets and property of Fidelity Trust Company should be conveyed by it to said trustees, in trust to liquidate the same for the benefit of Liberty Trust Company and the stockholders of Fidelity Trust Company.

On April 7, 1921, the agreement to sell was approved by the Supreme Judicial Court of Massachusetts and on April 14, 1921, certain assets and property were conveyed to the trustees. Among the assets so conveyed were the following: The mortgages on the vessels given by Farwell, the Whitney Steamship Corporation, and the Acme Steamship Corporation as aforesaid, the mortgage notes, and all right, title, and interest which Fidelity Trust Company had acquired in the judgment of Theodore A. Crane's Sons Company and in the maritime lien of Valk & Murdock Company.

The trustees, in accordance with the provisions of the above-mentioned agreement and declaration of trust, subsequently assigned and conveyed to Liberty Trust Company all assets and property received as such trustees, including those assets described in the next preceding paragragh.

XVI

39 The vessels were retained by the United States for its own use until July, 1919, and because of such retention and use just compensation is due to the parties entitled thereto. The United States Shipping Board claims that it is entitled to deduct, on account of the forwarding of the cargo as aforesaid, a sum which

is in excess of the amount which the said board is willing to pay by way of compensation for the retention and use of the vessels. The United States, therefore, has made no payment whatsoever for the requisition of the vessels.

XVII

Liberty Trust Company, as assignee of the aforesaid mortgages and mortgage notes, endorsed by the Whitney Steamship Corporation and the Acme Steamship Corporation, the partial assignee of the judgment of Theodore A. Crane's Sons Company and the assignee of the lien of Valk & Murdock Company, is entitled under the aforesaid contract of August 12, 1918, to one million twenty-three thousand forty-two and 63/100 dollars ($1,023,042.63) of any sum or sums recovered in the proceedings instituted in this honorable court by the Acme Operating Corporation.

XVIII

The mortgage to the Fidelity Trust Company on the "James S. Whitney" for $150,000.00 referred to in Article III hereof, and upon which no payment on account of principal had been made, matured April 30, 1918; the mortgage to said Fidelity Trust Company on the "Henry M. Whitney" for $200,000.00 referred to in Article IV hereof, and upon which no payment on account of principal had been made, matured June 4, 1918. The Fidelity Trust Company, as such mortgagee was, by the requisition of said vessels by the United States, as set forth in Articles VII and VIII hereof, prevented from foreclosing the aforesaid mortgages on the "James S. Whitney" and the "Henry M. Whitney" when they matured and remained unpaid.

XVIII-A

The market value of the "James S. Whitney" and "Henry M. Whitney" in April, 1918, when they were requisitioned and taken by the United States as aforesaid and during the entire period of requisition, substantially exceeded the amount of the aforesaid mortgages and of all liens and charges against said ships having priority over said mortgages. When the said ships were released from requisition July 19, 1919, and at all times thereafter said ships had no market value and by reason of the requisition as aforesaid by the United States of said ships, the security of said Fidelity Trust Company as mortgagee was rendered worthless and said Fidelity Trust Company was greatly damaged inasmuch as the respective mortgagors did not at the date of the maturity of the said mortgages or at any other time subsequent thereto have assets which said Fidelity Trust Company could come at to satisfy the debts secured by said mortgages.

XVIII–B

After the release of said "James S. Whitney" and "Henry M. Whitney" from requisition and by reason of the act of June 15, 1917 (c. 29, sec. 1, 40 Stat. 182), and the aforesaid contract of
41 August 12, 1918, Stafford and Miller, for the various corporations they controlled, and Fidelity Trust Company in 1919 and 1920 had negotiations with the United States Shipping Board for the adjustment of all claims between the parties and the United States arising out of the requisition of the said ships. Negotiations were continued until June 15, 1922, when, no agreement having been arrived at, an account stated was rendered to all parties by said board disallowing all claims. Said account showed a balance due the United States from the owners of the ships of $68,225.67. Parties being aggrieved by this result, the present proceedings are instituted.

XVIII–C

The claim of Liberty Trust Company, herein presented, as assignee of the mortgages to Fidelity Trust Company referred to in Articles III and IV hereof, is made in accordance with the provisions of the act of June 15, 1917 (c. 29, sec. 1, 40 Stat. 182).

The claim of Liberty Trust Company, herein presented, as assignee of the various claims of Fidelity Trust Company, as more fully set forth in Article XVII hereof, to be allowed to recover the amount set forth in said Article XVII from any judgment had in this proceeding by the Acme Operating Corporation for the use of said vessels by the United States during the period of requisition, is based upon the said act of June 15, 1917, and the said contract of August 12, 1918.

XIX

That no action on the claim of the petitioner has been
42 taken by Congress or any department except as stated in Article XVIII–B; that your petitioner is the sole owner of the above claim; that no assignment or transfer of same or any part thereof has been made, except as stated in this petition; that your petitioner is justly entitled to the amount claimed from the United States after allowing all just credits and offsets; that your petitioner and your petitioner's assignors are citizens of the United States and have at all times borne true allegiance to the Government of the United States and have not in any way aided, abetted, or given encouragement to rebellion against the Government of the United States; and that your petitioner believes the facts as stated in this petition to be true.

XX

Wherefore, your petitioner prays that it may be allowed to intervene and become a party to the suit in this court numbered E-260 and entitled "Acme Operating Corporation vs. The United States of America," in order that any decree of this court may protect your petitioner to the extent of its rights and remedies;

That the United States may be ordered to pay to your petitioner the principal amount due and unpaid on its mortgages, namely, $350,000.00, plus interest thereon from the respective dates of the maturity thereof;

That of any judgment awarded herein against the United States there be awarded to your petitioner, Liberty Trust Company, the sum of one million twenty-three thousand forty-two and 63/100 dollars ($1,023,042.63), with such interest thereon as the court may deem it is entitled;

43 And that your petitioner may have such further and other relief to which it may appear your petitioner is entitled.

Your petitioner further prays that a citation, to be directed to the Acme Operating Corporation and the United States of America, may be issued commanding them at a certain day to appear before this honorable court and then and there answer to the premises, and to stand to, and abide such order and decree therein as to this honorable court shall seem desirable.

LIBERTY TRUST COMPANY,
By ALLAN H. STURGES, (SEAL.),
Vice President.

[*Duly sworn to by Allan H. Sturges; jurat omitted in printing.*]

44 *Exhibit to intervening petition*

This agreement, made this 12th day of August, 1918, by and between the United States of America, by and through the United States Shipping Board, hereinafter designated as the party of the first part, and Whitney Steamship Corporation, a New York corporation, and Acme Steamship Corporation, a New York corporation, owners of the American steamers "Henry M. Whitney" and "James S. Whitney," hereinafter designated as the parties of the second part, and the Fidelity Trust Company, of Boston, hereinafter designated as the party of the third part, WITNESSETH:

WHEREAS the parties of the second part have heretofore purchased the American steamers "Henry M. Whitney" and "James S. Whitney," and have had alterations and repairs made thereon; and

WHEREAS certain cargoes have heretofore been shipped on board said steamers, consigned to Genoa, Italy, on which freight has been prepaid to the parties of the second part; and

WHEREAS the party of the first part has, under authority of law, requisitioned said steamers; and

WHEREAS to render said steamers available for the purposes for which they have been requisitioned, it has been necessary to discharge them of their cargoes and to prevent the prosecution of their intended voyages; and

WHEREAS the party of the first part is endeavoring to arrange for the forwarding of said cargoes to destination; and

WHEREAS the Fidelity Trust Company, of Boston, is the holder of mortgages upon said steamers;

NOW, THEREFORE, IT IS HEREBY AGREED as follows:

45 1. The party of the first part shall have the right, if and when it deems it practicable to use the necessary tonnage space in ships for such purpose, of which the party of the first part shall be the sole judge, to forward the cargoes (which will stand shipment) heretofore shipped on the steamers "Henry M. Whitney" and "James S. Whitney" to their respective destinations, as shown by the bills of lading heretofore issued by the parties of the second part and/or their agents.

2. In the case of any cargo being so forwarded the parties of the second part shall pay to the party of the first part, as compensation for the carrying of said cargo forward to destination, the going Shipping Board rates at the time said cargo is forwarded, and shall bear the expenses of caring for said cargo and reconditioning the same from any damage thereto, except such damage, if any, as may have been caused by the reshipment made necessary by the requisition of said steamers, and shall also bear the cost of forwarding from Charleston to New York the cargo now at Charleston intended for the steamer "James S. Whitney"; and, in party payment of the said compensation, the said expenses, the said forwarding costs, and interest thereon, the parties of the second part shall forthwith pay the party of the first part the sum of one hundred and eighty-seven thousand ($187,000) dollars. The balance of the said compensation, the said expenses, the said forwarding costs, together with interest thereon at the rate of six per cent (6%) per annum shall be repaid to the party of the first part by said party retaining and crediting against said indebtedness any and all sums that shall here-

46 after become due the parties of the second part, or any of them, by the party of the first part, as just compensation for the requisition of said steamers, or either of them.

3. In the event of the party of the first part fully reimbursing itself out of the compensation due for the requisitioning of said steamers, or either of them, for the aforesaid compensation for the carrying of said cargo forward to destination, the said expenses, the said forwarding costs, and interest thereon, the party of the first part shall have the right to apply any further compensation which

shall become due for the requisitioning of said steamers to the payment of any mortgages, and/or just claims constituting liens on said steamers, or either of them.

4. In the event of said steamers, or either of them, being released from said requisition, or being returned by the party of the first part to the parties of the second part, before the party of the first part shall have been fully reimbursed for the aforesaid compensation for the carrying of said cargo forward to destination, the said expenses, the said forwarding costs, and interest thereon, then the said party of the first part shall have and there are hereby created liens upon said steamers, and both of them, for the amount of the unpaid balance of the aforesaid compensation for the carrying of said cargo forward to destination, the said expenses, the said forwarding costs, and interest thereon, which amount shall be forthwith due and payable on the release of said steamers, or either of them, and which liens the parties of the second and third parts agree shall be superior to the mortgage liens of the Fidelity Trust
47 Company, of Boston, and which liens the parties of the second part agree shall be superior to any liens of the shippers and/or the consignees of cargoes for loss, damage, delay, or shortage of cargo.

5. In the event of said steamers, or either of them, being totally lost during the said requisition from any cause for which the party of the first part shall be liable for the value thereof, then the party of the first part shall have the prior right to offset against any amount for which it shall be liable to the parties of the second part for the value of said lost steamer or steamers, first, the unpaid balance of the said compensation for the carrying of said cargo forward to destination, the said expenses, the said forwarding costs, and interest thereon, second, the balance due upon any mortgages and/or any just claims constituting liens on said steamers, or either of them.

6. In the event of said steamers, or either of them, being insured against actual or constructive total loss by marine or war risks, and in the event of said steamers, or either of them, being lost so as to give a right of recovery under such insurance or against third parties, then the party of the first part shall be entitled to the proceeds of said insurance and/or of said recovery against third parties to the extent of the unpaid balance of the said compensation for the carrying of said cargo forward to destination, the said expenses, the said forwarding costs, and interest thereon, and the balance due upon any mortgages and/or any just claims constituting liens on said steamers, or either of them; and, to the extent of said insurance and of said recoveries against third parties, the party of the first part shall be discharged from all liability to answer for
48 the value of said steamers, or either of them, for which it would otherwise be liable under said requisition.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed the day and year first herein above written.

Witness to the signature of—
O. R. HOUSTON.

UNITED STATES OF AMERICA,
By UNITED STATES SHIPPING BOARD,
By IRA A. CAMPBELL,
Party of the First Part.

Witness to the signature of—
O. R. HOUSTON.

WHITNEY STEAMSHIP CORPORATION,
By ROBERT E. MILLER,
Party of the Second Part.

Witness to the signature of—
O. R. HOUSTON.

ACME STEAMSHIP CORP.,
By ROBERT E. MILLER,
Party of the Second Part.

Witness to the signature of—
J. D. CROWELL.

FIDELITY TRUST COMPANY,
By EDWIN T. MCKNIGHT,
Party of the Third Part,
Vice-President.

For and in consideration of the execution of that certain agreement, dated at New York this 12th day of August, 1918, by and between the United States of America, by and through the United States Shipping Board, as party of the first part, and the Whitney Steamship Corporation and the Acme Steamship
49 Corporation, as parties of the second part, and the Fidelity Trust Company of Boston, as party of the third part, it is hereby agreed by and between the United States of America, by and through the United States Shipping Board, and the Fidelity Trust Company, of Boston, that the United States Shipping Board will not transport to destination any of the cargo covered by the aforesaid agreement unless the owners, or duly authorized representatives of the owners, of said cargo, shall first have executed an agreement in the form and substance attached hereto, or if such agreement be not procurable from the said cargo owners, then not unless the Fidelity Trust Company consents to such transportation.

Dated, New York, this 12th day of August, 1918.

UNITED STATES SHIPPING BOARD,
By IRA A. CAMPBELL,
Admiralty Counsel.

FIDELITY TRUST COMPANY,
By EDWIN T. MCKNIGHT,
Vice President.

NEW YORK, NEW YORK, *August 12, 1918.*

In consideration of the United States of America, through the United States Shipping Board and/or the United States Shipping Board Emergency Fleet Corporation forwarding to Genoa, Italy, the hereinafter described cargo ex the steamers "Henry M. Whitney" and/or "James S. Whitney," without requiring payment of freight therefor, the undersigned owner of the said cargo hereby releases and forever discharges the United States of America, and/or the United States Shipping Board, and/or the United States Shipping Board Emergency Fleet Corporation from any and all claims of whatsoever nature and description which the undersigned owner may have (the United States not admitting that any exist) arising from, or in connection with, the original shipment of said cargo on said steamers, and/or the requisition of said steamers, and/or from the discharge, storing, detention, reloading, and/or transporting of the said cargo to Genoa, Italy, and/or arising from any other cause of whatsoever kind now existing.

And the said undersigned owner further agrees with the United States of America, the United States Shipping Board and the Fidelity Trust Company, of Boston, that any and all of the claims and/or liens which the undersigned cargo owner may have against the said steamers, or either of them, shall be subordinated to the mortgages on the said steamers, including the principal, accrued interest, and all expenses, now or hereafter constituting claims or liens upon said vessels, and to any and all liens and/or claims which the United States of America, and/or the United States Shipping Board may have, or shall hereafter acquire, upon said steamers, or either of them, for the cost of carrying said cargo forward to destination, the cost of requisitioning the same from any damage thereto, and the cost of forwarding from Charleston to New York the cargo now at Charleston intended for the steamer "James S. Whitney," as provided in that certain agreement by and between the United States of America, by and through the United States Shipping Board, and Whitney Steamship Corporation, and Acme Steamship Corporation, the owners of said steamers "Henry M. Whitney" and/or "James S. Whitney," and the Fidelity Trust Company, of Boston, dated in New York the 12th day of August, 1918.

Accepted:

----------,

By ----------.
For cargo owner.

----------,
For United States Shipping Board.

Description of cargo:

51 V. *General traverse to amended intervening petition*

Filed August 7, 1928

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the amended petition be dismissed.

HERMAN J. GALLOWAY,
Assistant Attorney General.

A. C.

VI. *Submission of case on merits*

On May 11, 1931, this case was submitted on merits, without argument, by Mr. John Walsh for the plaintiff, by Messrs. Howe and Bradley for the intervenor, and by Mr. Arthur Cobb for the defendant.

52 VII. *Special findings of fact, conclusion of law, and opinion of the court by Green, J.*

Filed February 8, 1932

Mr. John Walsh for plaintiff. Messrs. Louis B. Eppstein and Ira W. Hirshfield were on the briefs.

Messrs. Howe and Bradley for the intervenor. Pillsbury, Dana, Young & Moulton were on the brief.

Mr. Arthur Cobb, with whom was Mr. Assistant Attorney General Charles B. Rugg, for defendant.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

Special findings of fact

1. The United States, acting through the United States Shipping Board Emergency Fleet Corporation, hereinafter termed "the Fleet Corporation," pursuant to the authority of the act of Congress of June 15, 1917, and the Executive order of July 11, 1917, requisitioned on August 3, 1917, the title to all vessels above 2,500 deadweight tons capacity, building and under contract for building in the United States; and on October 12, effective October 15, 1917, requisitioned through the United States Shipping Board, hereinafter termed "the board," the use of all vessels under the United States flag of 2,500 dwt. capacity and over.

On February 27, 1918, trans-Atlantic voyages of vessels under 2,500 dwt. capacity were interdicted, and clearance for such voyages

of vessels of less than the capacity mentioned was thereafter refused.

On or before January 28, 1918, rates for trans-Atlantic carriage of cargo were definitely prescribed by the Government, and thereafter clearance was refused vessels charging in excess of the rates fixed.

2. On October 30, 1917, Bartholomew L. Stafford and Robert E. Miller, copartners, purchased the S. S. "James S. Whitney," subject to a mortgage made on that date by A. S. Farwell, to secure a note for $150,000 payable to the Fidelity Trust Company, of Boston, Massachusetts, and at the same time executed a bill of sale transferring said vessel to the Equitable Trust Company as security for a note given by Miller and Stafford for $250,000, on which
53 was realized $240,000, the difference, $10,000, being charged and retained by the Trust Company as a bonus. Miller and Stafford borrowed from E. W. Bassick $10,000 in cash and obligated themselves to pay Bassick the further sums of $15,000, as bonus on the loan from the Fidelity Trust Company, and $10,000, as commission for negotiating for the purchase of the vessel. The $400,000 cash thus realized was turned over to Farwell and by him paid over to the Eastern Steamship Company as the purchase price of the vessel, title to which was transferred to Farwell, who in turn made transfer to Miller and Stafford.

3. On October 31, 1917, Bartholomew L. Stafford and Robert E. Miller, copartners, adopted and caused to be registered in the county of New York and for some time thereafter conducted business under the trade name of Acme Steamship Company, hereinafter termed "the copartnership."

4. It was agreed between the Equitable Trust Company and Miller and Stafford that the copartnership would manage, operate, and control the S. S. "James S. Whitney" and the S. S. "H. M. Whitney," thereafter to be purchased, and deposit in the Trust Company for the account of the copartnership all revenues collected, and that such deposits would be by the Trust Company held in trust as security for all loans and advancements made, subject, however, to the withdrawal by the copartnership upon counter-signature of Heman Dowd, one of the vice presidents of the Trust Company, of such sums as should be required for actual operating expenses, and enlarging and reconditioning the vessels; it was also agreed that the S. S. "H. M. Whitney," when acquired, should be conveyed to the Trust Company as additional security for such loans and advancements; and it was, at the time of the organization of the several corporations hereinafter mentioned, further agreed that all moneys collected for affreightment contracts on account of the vessels should be deposited with the Trust Company to the account of Acme Operating Corporation, hereinafter termed the "Operating Corporation," subject as to withdrawal of funds, to the conditions above mentioned, except that checks should bear the signature of the corporation instead of the copartnership. All freight revenues col-

lected on account of the two vessels were by the copartnership and the Operating Corporation deposited in the Trust Company in accordance with the agreement.

5. Miller and Stafford had by November 8, 1917, perfected plans for enlarging from 2,200 to approximately 3,500 dead-weight tons capacity the S. Ss. "James S. Whitney" and "H. M. Whitney."

6. On December 3, 1917, the copartnership out of funds deposited to its credit paid to the Trust Company the above-mentioned note for $250,000, and made another note payable to the Trust Company for $250,000, receiving thereon $225,000, the balance, $25,000, being charged and retained by the Trust Company as a bonus on the loan, and, at the same time, executed a bill of sale, conveying the S. S. "H. M. Whitney" to the Trust Company as security for loans and advancements, and on December 4, 1917, concluded the purchase of the S. S. "H. M. Whitney," subject to a mortgage made on that day by A. S. Farwell, to secure a note of $200,000 given the Fidelity Trust Company on which the Trust Company advanced the sum of $175,000, making a charge of and retaining $25,000 as a bonus
54 on the loan; the $400,000 cash thus received was turned over to Farwell and by him paid to the Eastern Steamship Company as the purchase price of the vessel, title to which was transferred to Farwell, who in turn made transfer to Miller and Stafford. Miller and Stafford further obligated themselves to the payment of $20,000 as commission on the purchase of the vessel.

7. The S. S. "James S. Whitney," immediately following her purchase, was brought to the yards of Theodore A. Crane's Sons Company, New York, where certain minor repairs were effected at a cost of $27,095.13, which was paid out of funds deposited to the credit of the copartnership. After leaving the yards she was loaded with a miscellaneous cargo of 1,926 long tons, consigned to various parties in Genoa, Italy, and on November 29, 1917, cleared the port of New York for Charleston, South Carolina, under permit to finish lading outward cargo.

8. Upon arrival at Charleston the S. S. "James S. Whitney" was by the copartnership docked in the yards of Valk and Murdock Company, which company enlarged the vessel in accordance with the plans mentioned in finding 5. The cost of such work amounted on April 27, 1918, to $243,664.48, of which $111,155.03 was paid, $51,155.03 out of funds deposited to the credit of the copartnership, and $60,000 out of funds deposited to the credit of the Operating Corporation. The work of enlargement was completed shortly after April 27, 1918, at a further cost of $8,200.25, which was advanced by the Fleet Corporation to Valk and Murdock Company.

9. The S. S. "H. M. Whitney," after her purchase by Miller and Stafford, was brought to the port of New York and docked in the yards of Theodore A. Crane's Sons Company, which company enlarged the vessel in accordance with the plans mentioned in finding 5, the work being completed April 10, 1918, at a cost of $369,739.90,

of which $116,099.27 was paid out of funds deposited to the credit of the copartnership.

In addition to payments made on account of enlarging the vessel, there was expended for repairs the sum of $13,705.48, of which $294.65 was disbursed from moneys deposited to the credit of the copartnership, and $13,410.83 from moneys deposited to the credit of the Operating Corporation.

10. The S. S. "James S. Whitney" was completed and launched in the year 1900 and was of 2,200 dwt. capacity. Upon leaving the yards of Valk and Murdock Company, she was of 3,090 dead-weight tons capacity, had a speed of 14 knots per hour, and was staunch, strong, and in all respects seaworthy and fit for trans-Atlantic trade.

The S. S. "H. M. Whitney" was completed and launched in the year 1890, and was of 2,200 dwt. capacity. Upon leaving the yards of Treo. A. Crane's Sons Company, she was of 3,230 dwt. capacity, had a speed of 12½ knots per hour, and was staunch, strong, and seaworthy and fit for trans-Atlantic trade. Minor repairs required by the American Bureau of Shipping were made, and the cost thereof, $965.35, was paid by the board.

11. On November 24, 1917, the copartnership petitioned the board for exemption from requisition of the S. S. "H. M. Whitney" for the purpose of making two round trips to Genoa, Italy, the revenue from which was to finance enlargement of the vessel. This
55 the board on December 6, 1917, denied. A like petition was presented December 12, 1917, with reference to the S. S. "James S. Whitney," which was also denied January 3, 1918.

12. Bartholomew L. Stafford and Robert E. Miller, in December, 1917, together with other parties not financially interested but joined for the purpose of complying with the corporation laws of the State of New York, organized, under the laws of that State, Acme Steamship Corporation, Whitney Steamship Corporation, and Acme Operating Corporation.

Robert E. Miller and Bartholomew L. Stafford owned (each fifty per cent) all the capital stock of and controlled the three corporations mentioned from the dates of their respective organizations up to and including April 23, 1919, when Robert E. Miller assigned all his stock (50% of the whole) in the Acme Operating Corporation to Bartholomew L. Stafford or his nominee, following which the stock in the Acme Operating Corporation, formerly held by Robert E. Miller was issued to Claude T. Stafford, nominee of Bartholomew L. Stafford. Subsequently Robert E. Miller owned no part of the capital stock of Acme Operating Corporation, which thereafter conducted a general shipping business, none of its operations in anywise relating to any of the matters involved in this cause.

Miller and Stafford, during the period that Miller was joint owner of the stock in the several corporations above mentioned, were respectively president and treasurer of each corporation and were at all times in absolute control of these three corporations, and the Acme Operating Corporation at the time when the charter parties

were issued to it, as hereinafter set forth, was not operated as an independent concern but merely as an agency of the Acme and Whitney Steamship Corporations, which were themselves subsidiary to and merely holding agencies of the copartnership. When the charter parties hereinafter referred to were executed by the Acme and Whitney Steamship Corporations to the Acme Operating Corporation, the latter did not actually operate the steamships for itself but operated them for the Acme Steamship Corporation and the Whitney Steamship Corporation upon a commission for its services. It paid no rental for the steamships but kept an account on its books with the Acme Steamship Corporation and the Whitney Steamship Corporation severally in which they were charged with expenses incurred on account of said steamships and credited with moneys received in connection with the operation thereof.

13. A. On January 3, 1918, immediately upon the organization of the Acme Steamship Corporation, it was agreed between the corporation and Miller and Stafford, that (1) Miller and Stafford, copartners doing business under the trade name of Acme Steamship Corporation, would convey to the corporation their equity in the S. S. "James S. Whitney," and the corporation would issue to Miller and Stafford its total capital stock; that (2) the corporation would accept the conveyance of the S. S. "J. S. Whitney" subject to two mortgages, one of $250,000 to the Equitable Trust Company, and one of $200,000 to the Fidelity Trust Company, and assume and pay these obligations; and (3) accept the vessel subject further to the charter party, the essential terms of which are set out in paragraph C below; that (4) Miller and Stafford should make such repairs
56 and improvements to the vessel as in their judgment might be necessary or desirable, their decision to be conclusive upon the corporation; and that (5) if for any reason, either by act of the Government or from other cause, Miller and Stafford should be prevented from carrying out the terms of the charter party and from retaining the amounts contracted for under the charter party to be paid to them as freight, then and in that event the corporation would repay them and they would retain out of moneys to become due it out of the charter party or collect from any other assets of the corporation an amount sufficient to cover all their expenses for repairs and for all other work performed on the vessel since the first day of November, 1917, and that the corporation become liable to repay them all sums of money which the corporation might pay or agree to pay for repairs or other work to be done upon the vessel; and that the corporation would be bound by the acts of Miller and Stafford made in good faith in making or contracting for such repairs.

B. On January 4, the day following the formal organization of Acme Steamship Corporation, there was entered into between the corporation and Miller and Stafford an agreement identical in all respects with the above-mentioned agreement between Whitney Steamship Corporation and Miller and Stafford, except that the name Whitney Steamship Corporation appears instead of the name

Acme Steamship Corporation and the name of the vessel S. S. "H. M. Whitney" appears instead of the name of the vessel S. S. "James S. Whitney," and instead of the amount of $200,000, secured by the mortgage to Fidelity Trust Company, there appears the amount of $150,000.

C. On and as of January 7, 1918, charter parties identical except as to the names of the corporations and vessels involved were executed severally between Miller and Stafford and Acme Steamship Corporation in relation to the S. S. "James S. Whitney," and between Miller and Stafford and Whitney Steamship Corporation in relation to the S. S. "H. M. Whitney," the charter parties providing "that the * * * owners agree to let, and the * * * charterers agree to hire the said steamship from the time of delivery, for about three months," and "that the charterers shall pay for the use and hire of the said vessel (46/6) forty-six shillings six pence British sterling per calendar month, commencing on and from the day of her delivery," and that the charterers should have the option of renewal for a further period of four months upon giving ten days' notice prior to the expiration of the term or of any declared option and—

"That the owners shall have a lien upon all cargoes, and all subfreights for any amounts due under this charter, and the charterers to have a lien on the ship for all moneys paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once,"

and in addition to the usual clauses of the standard time form of charter party (time charter, Government form, approved by the New York Produce Exchange, November 6, 1913)—

"That the charterers, in addition to the amounts provided for in paragraph 4 hereof to be paid for the use and hire of the said vessel, shall further pay for all repairs and improvements
57 made upon said vessel by them or under their direction, excepting such as are approved in writing by the owners prior to the delivery of said vessel to them as aforesaid, it being understood and agreed, however, that the delivery of said vessel shall not be considered as made until after all such reasonable repairs or improvements as said charterers may desire to make upon said vessel shall have been completed."

D. On January 5, 1918, upon the organization of the Acme Operating Corporation, Miller and Stafford had collected for freights on account of the charter party with Acme Steamship Corporation $297,675.53, and expended on account thereof $342,588.73, and had collected for freights on account of the charter party with Whitney Steamship Corporation $227,752.87, and expended on account thereof $24,302.33; had agreed with the Equitable Trust Company that all moneys received under both charter parties, excepting such as might be released by mutual agreement, should be known to Acme and Whitney Steamship Corporations and applied to the payment of the obligation to the Equitable Trust Company on account of lien

inst the S. S. " H. M. Whitney," and so advised the corporation; it was agreed between the corporation and Miller and Stafford they would transfer to the corporation the charter parties with Acme and Whitney Steamship Corporations, all claims against ne and Whitney Steamship Corporations on account of moneys ended on behalf of said corporations and on any other account ept for salaries, and their right, title, and interest in the registered le name of Acme Steamship Corporation; that the Acme Operat- Corporation would issue to Miller and Stafford 4,997 shares of capital stock, assume and pay at maturity the obligations in- red by Miller and Stafford in connection with the charter parties, ribute the proceeds of any freight moneys collected in accord- e with the agreements under the charter parties and with the itable Trust Company and promptly carry out the terms of the eements, pay to Miller and Stafford out of the corporation's ings and within twenty-four months or sooner if sufficient cash plus be accumulated the sum of $200,000, and, further, that the poration would assume any and all obligations incurred by Miller Stafford to the Acme and Whitney Steamship Corporations to e repairs and improvements upon the S. Ss. " James S." and . M. Whitney " and perform all work necessary to place the ves- in condition to carry out the charter parties.

. A. Freight revenue were collected and deposited to the unt of the copartnership, and disbursements made therefrom as ows:

	Account S. S. J. S. Whitney	Account S. S. H. M. Whitney	Total	Total
ior to Jan. 5, 1918:				
Net freight revenues	$297,675.53	$227,752.87	$525,428.40	
Expenditures	342,588.73	24,302.33	366,891.06	
Balance, Jan. 5, 1918			158,537.34	
bsequent to Jan. 5, 1918:				
Net freight revenues	164,752.54	202,612.53	367,365.07	$525,902.41
Expenditures	114,959.04	401,182.77	516,141.81	
Deferred charges			9,760.60	525,902.41

B. Freight revenues were collected subsequent to January 28, 1918, and deposited to the account of the Operating Cor- ation, and disbursements made therefrom as follows:

	Acme S/S Corporation, S. S. J. S. Whitney	Whitney S/S Corporation, S. S. H. M. Whitney	Totals
eight revenues	$188,785.83	$186,860.47	$375,646.30
ditures	181,458.85	179,533.49	360,992.34
ed charges			14,653.96
Total			375,646.30

Of the amount expended, $93,500.00 was paid to the board on account of S. S. "J. S. Whitney" and $93,500.00 to the board on account of the S. S. "H. M. Whitney."

C. During the latter part of March, 1918, a firm of accountants was employed by the Operating Corporation to open a set of books covering all transactions in respect to the S. Ss. "James S." and "H. M. Whitney," and the several corporations and the copartnership. The opening entry was of January 5, 1918, and covered transactions of Miller and Stafford from November, 1917, to that date. Subsequent to January 5 all transactions were entered as of the dates to which they related, and items were entered currently after the date on which the books were opened. The accounts in the books of the Operating Corporation stood at the end of October, 1918, as follows:

		Acme S/S Corporation, S. S. J. S. Whitney	Whitney S/S Corporation, S. S. H. M. Whitney	Totals
Net freight revenues		$651,213.90	$617,225.87	$1,268,439.77
Notes, interest, bonus, and commissions incident to purchase of vessels		294,565.00	248,011.67	
Administrative overhead		23,382.95	22,882.19	
Enlargement and repairs to vessels		150,325.76	127,729.15	
Equipment of vessels		4,083.15	10,253.17	
General operation of vessels		72,009.69	101,502.34	
Deposits to account of owning corporations		1,140.07	1,140.07	
Payment to U. S. S. Board:				
Liberty bonds	$100,551.25			
Par over cost	3,448.75			
Cash	83,000.00			
Total	187,000.00	93,500.00	93,500.00	
		639,006.62	605,018.59	1,244,025.21
Deferred charges:				
Office maintenance	12,456.88			
Legal expenses	13,872.39			
Office furniture	1,534.04			
	27,863.31			
Less credit profit on Liberty bonds	3,448.75			24,414.56
				1,268,439.77

The item, general operations, includes costs of fuel, wages of ship officers and crews, stewards' stores, deck and engine-room supplies, customs and other fees, travel incident to cargoes and vessels, insurance and bonds, brokerage, wharfage, and harbor expense, warehousing and stevedoring, and no other charge or cost.

59 15. Immediately after the purchase of the S. S. "James S. Whitney," Miller and Stafford, doing business under the copartnership name, solicited and secured contracts of affreightment for both the S. Ss. "James S." and "H. M. Whitney," issued bills of lading, and collected freight moneys therefor, and following the organization of Acme and Whitney Steamship Corporations and the Operating Corporation, secured contracts of affreightment for the vessels, issued bills of lading variously in the names of the copartnership and the several corporations, and collected freight moneys which were

deposited to the account of the copartnership up to January 28, 1918, and thereafter to the account of the Operating Corporation.

16. On April 26, 1918, the board duly passed the following resolution:

"Whereas, in view of the representations made to the board by the shipping control committee as to the urgent need by General Pershing for the immediate service of the "J. S. Whitney" and the "H. M. Whitney" for towing barges across the Atlantic, and in view of the absence of any other tonnage that would acceptably perform the service which the vessels mentioned are well equipped to render;

"And whereas it has been recommended that the vessels should be taken by the board without regard to prior commitments made by their owners and delivered to the shipping control committee to be used in pursuance of General Pershing's direction: Be it

"Resolved, That the two S. Ss. "J. S. Whitney" and "H. M. Whitney" be at once requisitioned by the board on the above basis, and delivered, free of any cargo, to the shipping control committee, to be utilized for military purposes."

17. On April 27, 1918, the balance on hand and in bank to the credit of the Operating Corporation was from all sources $256,968.71, and there were outstanding uncollected invoices rendered on account of bills of lading issued, amounting to $35,305.23. The amount in bank to the credit of Acme Steamship Corporation was $1,140,07, and to the credit of Whitney Steamship Corporation $1,140.07; these amounts were the only deposits made to the credit of these two corporations.

On April 27, 1918, the outstanding indebtedness incurred by the copartnership, the Acme and Whitney Steamship Corporations, and the Operating Corporation, amounted to $816,349.91, of which obligations in the amount of $69,082.82 were subsequently paid by the Operating Corporation, disbursements for which are included in the amounts set out in finding 14, leaving unpaid the following:

Note due April 30, 1918, to Fidelity Trust Company with accrued interest	$150,000.00
Note due June 4, 1918, to Fidelity Trust Company with accrued interest	200,000.00
Due to Valk and Murdock, enlarging S. S. James S. Whitney	132,509.45
Due to Theo. Crane's Sons Company, enlarging the S. S. H. M. Whitney	253,640.63
Due to South Carolina warehouse for storage of cargo	9,749.84
Due to Oakdene warehouse at Charleston, storage charges on cargo, approximately	1,367.17
	747,267.09

18. On April 27, 1918, the S. S. "James S. Whitney" lay in the yards of Valk & Murdock Company at Charleston, where she
60 had been for approximately four months during the progress of the work of reconditioning and enlargement. There was then owing to Valk & Murdock Company a balance of $132,509.45 on account of such work performed.

On the said day at 6.00 p. m. the United States, by and through the board and pursuant to the authority mentioned in finding 1, requisitioned the vessel; and shortly thereafter, before she had been moved, she was by the U. S. marshal arrested pursuant to a libel in rem for the aforementioned sum of $132,509.45, filed in the District Court of the United States for the Eastern District of South Carolina against the ship by Valk and Murdock Company for labor performed and materials furnished incident to the work of reconditioning and enlargement.

An interlocutory order was issued May 18, 1918, in which the court, after reciting the provisions of the above-mentioned act of June 15, 1917, relative to the payment of compensation by the United States for vessels requisitioned, ordered and decreed that, in order to protect the rights of parties having prior liens upon the vessel and who had come into court to have them adjudicated, the amount to be paid for the use of the vessel would be treated as and in lieu of the vessel itself, and that the libellants were entitled in priority to the owners to any sum or sums to be paid on account of the requisition of the vessel. On May 27, 1918, an order was entered by the court directing that the vessel be delivered to the board, and possession was forthwith taken over by the board pursuant to the requisition and order.

19. On April 29, 1918, the S. S. "H. M. Whitney" was in custody of the United States marshal for the Eastern District of New York, having been arrested pursuant to a libel theretofore filed by Theodore Crane's Sons Company for a balance due the libellant of $253,640.33 on account of reconditioning and enlarging the vessel, and a similar proceeding by Patent Vulcanite Roofing Company, Inc., for alleged damages in the amount of $100,000.

The United States, by and through the board, on April 27, 1918, and pursuant to the authority above mentioned, issued its order of requisition of the S. S. "H. M. Whitney."

Shortly thereafter the District Court of the United States for the Eastern District of New York issued an order—

"That James M. Power, United States marshal for the Eastern District of New York, be and he is hereby permitted to appoint the master of the steamship 'H. M. Whitney' as special deputy United States marshal; and that the said special deputy marshal remain in possession of said vessel for and in behalf of the said United States marshal; and that the said vessel in such custody be turned over by him to the United States Shipping Board for purposes connected with the war, the said special deputy marshal or his substitute to remain always in the possession of the said vessel; and that the said vessel be returned to the custody of marshal of this court upon being released from requisition by said United States Shipping Board."

The vessel was taken over by the board as of April 29, 1918, at one p. m.

20. Promptly after the S. S. "James S. Whitney" had been delivered by the United States marshal to the board, the vessel was

taken to New York and her cargo discharged; and promptly
61 after the S. S. "H. M. Whitney" had been taken over by the board the cargo on board was likewise discharged, and was stored in the warehouses of Pier 96, New York Harbor, the use of which was necessary for the care and preservation of the cargo and was obtained from the city of New York at a rental of $14,306.04, which was paid by the board.

The cargo from both vessels was by the Kerr Steamship Company, employed by the board for that purpose, discharged and stored in a warehouse in New York Harbor "For the account of whom it may concern," and insured for the benefit of such interests as might appear.

21. After the discharge of the cargoes from the two vessels they were equipped with towing machines and fitted for trans-Atlantic service for the Army, the work of fitting out the S. S. "James S. Whitney" being completed on June 25, 1918, and the S. S. "H. M. Whitney" on May 31, 1918, on which dates the vessels were respectively delivered to the United States Army. The "James S. Whitney" remained in the service of the Army until September, 1918, when she was returned by the Army to the board, which then turned her over to W. R. Grace & Company for operation and management, and in this service made two voyages, returning to New York Harbor May 22, 1919, where she lay until her return by the board to the Acme Steamship Corporation.

The S. S. "H. M. Whitney" remained in the service of the Army until December 26, 1918, when she was by the Army returned to the custody of the United States marshal for the Eastern District of New York, and the vessel thereafter remained in such custody, and lay in New York Harbor until her final return by the board to Whitney Steamship Corporation.

22. On August 6, 1918, the board by telegram authorized transfer of title to the vessels from Arthur A. Miller, an officer of the Equitable Trust Co., to the two steamship corporations, S. S. "James S. Whitney" to the Acme Steamship Corporation and the S. S. "H. M. Whitney" to the Whitney Steamship Corporation, and on August 7, 1918, delivered to Miller and Stafford, at the office of Acme Operating Corporation, the final draft of the contract, termed the contract of August 12, 1918, between the United States, acting through the board, Acme Steamship Corporation, Whitney Steamship Corporation, and Fidelity Trust Company.

The Operating Corporation delivered its two checks in the amount of $83,000 and 104 Liberty bonds of the par value of $1,000 each to the Equitable Trust Company for transmission to the board upon condition that the contract of August 12, 1918, be executed, and the Equitable Trust Company so advised the board.

On August 12, 1918, the contract of that date, a copy of which appears on pp. 30–34 of the intervening petition and is by reference made a part hereof, was executed between the board and the Whitney and Acme Steamship Corporations and Fidelity Trust Com-

pany. The contract, after reciting that whereas the Acme and Whitney Steamship Corporations had purchased and repaired and altered the S. Ss. "James S." and "H. M. Whitney" and there had been shipped on board the vessels certain cargoes on which the freight had been prepaid to Acme and Whitney Steamship Corporations, and the Government had requisitioned the vessels
62 pursuant to law and it was necessary in carrying out the purpose of the requisitions that the cargoes be discharged and the intended voyages prevented, and the board was endeavoring to arrange for forwarding the cargoes to their destination, and Fidelity Trust Company was the holder of mortgages upon the vessels, provides, among other clauses relating to loss of vessels and not material herein:

That (1) the board would when practicable forward to their destination such cargoes as would stand shipment; that (2) Acme and Whitney Steamship Corporations would pay compensation therefor to the board at the going board rates at time of shipment, bear the cost of forwarding from Charleston to New York the cargo intended for the S. S. "James S. Whitney," and bear the expense of caring for the cargoes and "the cost of reconditioning the same from any damages thereto," except such damages as may have been caused by reshipment necessitated by the requisitions; and in part payment therefor Acme and Whitney Steamship Corporations would forthwith pay to the board $187,000, the balance with 6% interest to be paid by retention by the board and crediting against the indebtedness all sums that might become due to either or both of the steamship corporations as just compensation for the requisitions; that (3) the board, if the amount of compensation due for the requisitions should exceed the sum necessary fully to reimburse itself, should have the right to apply such excess to the payment of any mortgages and/or liens on either of the vessels; that (4) if, before the Government should have been fully reimbursed and paid for the abovementioned carriage of cargo and expenses, either of the vessels should be released from requisition or returned to the Acme or Whitney Steamship Corporations, the Government should have liens on the vessels superior to the mortgages of the Fidelity Trust Company and any liens of shippers or consignees of cargoes and for the amount of any unpaid balance which on release of the vessels should become immediately due and payable.

On the same day, August 12, 1918, there was executed by the board and Fidelity Trust Company an agreement the provisions of which were essentially that the board would not transport any of the cargo covered by the contract of August 12, 1918, without the consent of the Fidelity Trust Company, unless and until the owners of the various cargoes should first execute an agreement which would provide that the cargo owner release the board from all claims arising from original shipment of cargo or the requisition of the vessels and discharge, storage, detention, reloading, or transportation of cargo to

Genoa or from any other cause, and that any claims or liens which the owner might have against either of the vessels should be subordinated to the mortgages on such vessel, including principal and interest and to any liens and claims which the board might have or acquire on either of the vessels for the cost of carrying the cargo to destination or reconditioning the same or of transportation from Charleston to New York of cargo intended for the S. S. "James S. Whitney."

On August 12, 1918, the Equitable Trust Company forwarded to the board check for $83,000 and 104 third Liberty loan bonds of the par value of $1,000 each, stating that payment was for the account of Acme and Whitney Steamship Corporations and in full
63 discharge of the obligations of the Equitable Trust Company to the Operating Corporation under instructions contained in its letter of that day; and on the same day Arthur A. Miller conveyed title to the S. Ss. "James S." and "H. M. Whitney" to Acme Steamship Corporation and Whitney Steamship Corporation, respectively.

On December 4, 1918, there were executed nunc pro tunc, the one as of April 27, 1918, and the other as of April 28, 1918, requisition charter parties, on standard U. S. S. B. Charter Form No. 2, respectively, between the board and Acme Steamship Corporation covering the S. S. "James S. Whitney," and between the board and Whitney Steamship Corporation covering the S. S. "H. M. Whitney." Both vessels were operated by the board on bare-boat basis. The charter parties, among other clauses not material to the controversy, provided:

"In consideration of the compensation provided and the other obligations assumed by the United States hereunder, the owner accepts this requisition charter in full satisfaction of any and all claims he has or may have against the United States arising out of the requisition and accepts the compensation herein provided for as the just compensation required by law; provided, however, that the acceptance of this requisition charter shall be without prejudice to the claim, if any, the owner may have against the United States arising out of recoveries against the owner by third parties on the vessel's commitments."

At the time of the execution of the above-mentioned charter parties, R. E. Miller executed under oath and filed with the board two affidavits, one as president of the Acme Steamship Corporation and in respect to the S. S. "James S. Whitney," and the other as president of Whitney Steamship Corporation, and in respect to the S. S. "H. M. Whitney," stating in each of the affidavits that he had charge of commitments covering the vessel during the time previous to her requisition, and that at the time of her requisition the vessel was under no commitment.

23. The copartnership had made commitments for the S. S. "James S. Whitney" of 8,146,936 lbs., or 3,637.025 tons, of cargo on

which freight had been collected in the sum of $589,043.80, but, after the vessel had sailed from New York to Charleston, 1,553,793 lbs., or 693.66 tons, of cargo and freights collected thereon in the amount of $104,409.78 were transferred from the account of that vessel to that of the S. S. " H. M. Whitney," and at the time of the requisition there was on the books of the Operating Corporation assigned to the S. S. "James S. Whitney " 6,593,143 lbs., or 2,943.67 tons, of cargo and freights collected thereon in the amount of $484,634.02.

At the time of the requisition of the S. S. " H. M. Whitney " there was on the books of the Operating Corporation assigned to the vessel 11,658,870 lbs., or 5,204.85 tons, of cargo on which there had been collected freight in the amount of $809,104.09, including, in addition to the above-mentioned cargo and freight moneys transferred from the account of the S. S. " James S. Whitney," several lots of cargo covered by commitments for shipment at the option of the copartnership on either the S. S. " James S." or " H. M. Whitney " or substitute vessels and on which freight moneys in the amount of $124,340.21 had been collected.

64 Of the 18,252,013 pounds of goods appearing on the freight records of the copartnership and/or the Operating Corporation as assembled in warehouses and/or loaded on the S. Ss. " James S." and " H. M. Whitney," 1,546,510 pounds, or 690.41 tons, of the gross allocation of cargo to the S. S. " H. M. Whitney " were, on demand of the shippers, returned to the consignors and the freight charges thereon either not collected or refunded, such refunds amounting to $25,298.34; 137,568 pounds of the goods were lost, 17,750 pounds by fire and 119,496 pounds by leakage and corrosion of containers, and there were shortages by reason of errors in original weights and short shipments amounting to 155,318 pounds. The remaining lots of goods, 16,412,939 pounds, the board forwarded to the consignees and paid the carriers therefor $703,560.33.

In discharging the cargoes on board the S. Ss. " James S." and " H. M. Whitney " at the time of the requisitions in the care and protection of such cargoes and goods assembled and stored, as mentioned in findings 20 and 22 in warehouses in New York and Charleston, and in loading for transport by the board, the board expended in addition to the amount $14,306.04, set out in finding 20, $145,494.06 on account of the items and in the amounts following:

Watchmen and guards for protection of goods stored on Pier 63 for shipment on S. Ss. James S. and H. M. Whitney	$1,514.00
Trucking goods in Charleston from warehouses to dock for shipment	172.49
Cleaning pier in New York after shipment of goods, being required by the city of New York	75.20
Warehouse charges for storage and care of goods by the copartnership in Charleston	11,117.01
To the Operating Corporation for storage on Pier 63 of goods for shipment on S. S. H. M. Whitney	6,277.50
Expenditures made in reloading on S. S. James S. Whitney approximately 810 tons of goods removed while vessel was in yard of Valk & Murdock for enlargement	5,807.19

To Kerr Steamship Company for reimbursement of expenditures as follows:

	James S. Whitney	H. M. Whitney	
Discharging and loading cargo	$4,276.24	$10,695.35	
Cooperage	1,183.42	631.93	
Storage and wharfage	30,270.43	816.75	
Insurance on cargo	4,147.01	25,448.30	
Lighterage, towage, cartage	11,662.31	13,366.02	
Watchmen	464.00	3,703.50	
Miscellaneous—clerical work, cleaning piers, incidental labor, etc	2,323.76	1,541.75	
	54,327.07	56,203.60	$110,530.67
To Kerr Steamship Company for services			10,000.00

The board received as freight moneys from shippers of goods assembled and stored, as referred to in finding 22, at Pier 63, the sum of $32,370.44.

24. Subsequent to the delivery of the S. S. "H. M. Whitney" by the board to Whitney Steamship Corporation, the board, at the request and for the account of said corporation and as also requested by the Fidelity Trust Company, employed and maintained on board the vessel watchmen and a ship's crew from July 8, 1919, to August 11, 1919, pending adjustment by said corporation and Trust Company of certain claims against the vessel, and expended for wages, pilotage, and towage in such care of the vessel the sum of $1,038.45.

65 Both vessels were, by the owners, subsequent to delivery by the board, the S. S. "James S. Whitney" on July 10 and the S. S. "H. M. Whitney" on July 22, 1919, placed in the dock of Robins Dry Dock and Repair Company, Erie Basin, New York Harbor, for repairs and reconditioning and were later removed, the S. S. "James S. Whitney" on August 29 and the S. S. "H. M. Whitney" on September 30, 1919, from the dry dock by Arthur L. Crowley, agent of the owners and Fidelity Trust Company.

Subsequent to the delivery of the vessels by the board, Robert S. Haight, consulting engineer and ship surveyor, rendered a bill against the vessels and owners for services in the sum of $511.60, which was approved by the owners and by Fidelity Trust Company, paid, and charged, one-half each to the two corporations.

After delivery of the S. S. "James S. Whitney" the Fidelity Trust Company advanced and paid for the account of Acme Steamship Corporation $55,377.26 to various parties for sundry services and materials in connection with the said ship.

After delivery of the S. S. "H. M. Whitney" the Fidelity Trust Company advanced and paid for the account of Whitney Steamship Corporation $81,087.50 to various parties for sundry services and materials in connection with said steamship.

The payments made on these steamships are made up of various items nearly all of which are expenses for direct repairs; $39,676.64 was paid the Robins Dry Dock & Repair Company for repairs made on the "James S. Whitney," and $42,401.33 was paid the same repair company for the same kind of services on the "H. M.

Whitney." There are some payments for surveys, which apparently were necessary to determine the amount of repairs, and an item on each steamship for port insurance, which appears to have been a necessary expense while the ships were being repaired; $3,000 was paid for two lifeboats and fittings in connection therewith for the "James S. Whitney," and $4,165 was paid for two lifeboats and connections and some other items for the "H. M. Whitney." There is nothing in the evidence to show that any portion of these two items, totaling $7,165, was in the nature of repairs or reconditioning worn portions of the vessels.

From the date of delivery of the vessels by the defendant to Acme and Whitney Steamship Corporations, the Fidelity Trust Company, through Arthur L. Crowley, agent, operated the vessels, the S. S. "James S. Whitney" until August, 1920, and the S. S. "H. M. Whitney" until June 30, 1920, under an agreement entered into on June 30, 1919, between the parties.

The net loss from such operation of the S. S. "James S. Whitney" was, without reference to the advances of $55,377.26 mentioned above, $13,367.18; the net loss on the S. S. "H. M. Whitney" was, without reference to the advances of $81,087.50 mentioned above, $90,969.32.

25. Charter hire rates in the open world markets, among nations which imposed no limitation with respect to shipping and charter rates, were for vessels of the class of the S. Ss. "James S." and "H. M. Whitney" constantly fluctuating. In April, 1918, the rate was 41s. 4d. per dead-weight ton per month, time charter, after which there was a consistent drop until August, 1918, when
66 the rate had fallen to 33s. 6d., from which there was a consistent advance to 45s. during the months of October and November, followed by a consistent drop to 21s. 6d. in February of the following year, when the rate consistently advanced again to 26s. per dwt. per month in July, 1919. The rate of exchange between British pounds sterling and dollars was in April, 1918, $4.76 per pound, and this rate dropped uniformly until the middle of July, 1919, when the rate was $4.50 per pound sterling.

26. At various times between the first week in January and the last of April, 1919, letters were written under the caption "Acme Steamship Corporation, 11 Broadway, New York," and signed "Acme Operating Corporation, B. L. Stafford, vice president," or "Acme Operating Corporation, R. E. Miller, president," requesting that the vessels be chartered by the board to the writers, stating that the several corporations were not in position to accept the return from requisition of the vessels, owing to liens against and various indebtedness of the ships, and that the charter of the vessels would be simply a charter party such as would be made between the Government and any other corporation, and that it should not constitute a return of the vessel.

Early in April, 1919, B. L. Stafford asked and the board gave permission for him to purchase Miller's interest in the vessels.

Early in July, 1919, B. L. Stafford advised the board:

" * * * I have a one-half interest in the " James S. Whitney " and the " H. M. Whitney."

" It has been brought to my attention that statements have been emanating from Mr. Miller intended to give you the impression that such is not the case.

" I have in my possession one-half of the entire capital stock of the Whitney Steamship Corporation and one-half of the entire capital stock of the Acme Steamship Corporation * * *."

On September 30, 1919, Acme Steamship Corporation, by R. E. Miller, vice president, advised the board—

" * * * that the Acme or Whitney Steamship Corporations have no connection whatever with the Acme Operating Corporation, and also that Mr. B. L. Stafford, formerly vice president, is no longer an officer or director of these two corporations."

27. On April 23, 1919, there was executed between the Operating Corporation and the Acme Steamship Corporation an instrument the essential provisions of which were, that the Operating Corporation released Acme Steamship Corporation from all liability arising out of the operation of the S. S. " James S. Whitney " by the Operating Corporation or by reason of any charter party in relation to the vessel or on account of any improvements or alterations made thereon by the Operating Corporation or its predecessors in interest, Robert E. Miller and B. L. Stafford, or on account of any moneys expended for or on account of the vessel in any manner whatever, the release to operate as against the vessel itself as well as the parties; that the Operating Corporation assigned to the Acme Steamship Corporation all interest and claim that it might have against the vessel and further, all moneys that might be due or become due from the Government or any of its agencies by reason of taking over of the steamer by the Government, and further, any claims for damages or
67 otherwise against the Government; and that the intended purport of the agreement was to relinquish any and all right, title, interest, and claim that the Operating Corporation had in and to the steamer or against Acme Steamship Corporation.

On the same date there was executed by and between the Operating Corporation and Whitney Steamship Corporation an instrument identical in all respects and terms, excepting only that instead of Acme Steamship Corporation and S. S. " James S. Whitney," there appears in the body of the instrument Whitney Steamship Corporation and S. S. " H. M. Whitney," and of the signatures that of Whitney Steamship Corporation instead of that of Acme Steamship Corporation was subscribed.

28. On June 30, 1919, there was executed between Fidelity Trust Company, Acme Steamship Corporation, Whitney Steamship Corporation, and Arthur L. Crowley an agreement which provided that the two steamship corporations would deliver the S. S. " James S." and " H. M. Whitney " to Arthur L. Crowley for management and control, and that Crowley would accept the management and opera-

tion of the vessels at a fixed compensation and render itemized statements of receipts and disbursements to the Fidelity Trust Company, which should have the right to apply all income to the payment of the obligations against the vessels.

Following the execution of the above-mentioned agreement, the Acme and Whitney Steamship Corporations advised the board of their readiness to accept the immediate return of the S. Ss. "James S." and "H. M. Whitney." The vessels were both in need of repairs, and it was agreed between the board and the two steamship corporations that instead of the board havig the repairs made on its own account the vessels would be delivered at once, surveyed by a board of survey, consisting of representatives of the board and of the respective owners, for the purpose of "ascertaining the extent of repairs and alterations necessary to place the vessel(s) in good and satisfactory condition, ordinary wear and tear excepted," and determining the fair and reasonable cost of such repairs and alterations; that such estimated costs as agreed upon by the representatives of the parties would be by the board and the respective steamship corporations accepted as final and determinative with respect to all obligations of the board in relation to repairs on the vessels.

The S. S. "James S. Whitney" was by the board on July 10, 1919, at 7.00 a. m., delivered to Acme Steamship Corporation, and the S. S. "H. M. Whitney" was by the board on July 8, 1919, at 12.00 noon, delivered to Whitney Steamship Corporation. The board credited, against the charges made by it on account of forwarding the cargoes as above set out, charter hire at the board's prescribed requisition charter rate, the Acme Steamship Corporation on account of the S. S. "James S. Whitney" with $251,531.07, and the Whitney Steamship Corporation on account of the S. S. "H. M. Whitney" with $237,716.10.

On July 25, 28, and 31, 1919, the S. Ss. "James S." and "H. M. Whitney" were, pursuant to the above-mentioned agreement, severally surveyed by a board of survey composed of W. Scott, representing the board, and H. G. Isdale, representing, respectively,
68 the Acme Steamship Corporation and the Whitney Steamship Corporation, and the board of survey found and determined that, after an examination of each of the vessels and as per contract prices submitted and agreed upon, the fair and reasonable cost of repairing and reconditioning the vessels, including last dry docking and opening all machinery for survey, and executing voyage repairs, was, in the case of the S. S. "James S. Whitney" $35,000, and in the case of the S. S. "H. M. Whitney" $37,500, the owner in each case to be allowed, in addition to the amounts mentioned, 14 days' requisition charter hire for the time in which to execute the work.

The board credited the steamship corporations with the amounts set out in the findings of the board of survey, plus charter hire for the period specified; the total credits given were, to Acme Steamship

Corporation on account of the S. S. "James S. Whitney" $42,884.48, and to Whitney Steamship Corporation on account of the S. S. "H. M. Whitney" $44,822.36.

29. On August 16, 1918, the United States District Court for the Eastern District of New York rendered judgment in the proceedings mentioned in finding 19 for the libellant, Theodore A. Crane's Sons Company, in the sum of $260,149.87, of which $253,640.63 was for materials and work furnished and done on the S. S. "H. M. Whitney," $1,426.43 for costs, and the remainder for interest to the date of judgment. On or about the 5th day of August, 1919, the Fidelity Trust Company, at the request of the Acme and Whitney Steamship Corporations, and to protect its interest as mortgagee and prevent the sale of the S. S. "H. M. Whitney" for satisfaction of the above-mentioned judgment and further proceedings and sale of the S. S. "James S. Whitney," pursuant to the libel proceedings of Valk and Murdock Company, mentioned in finding 18, entered into agreements severally with Theodore Crane's Sons Company and Valk and Murdock Company for the purchase of their several claims against the respective vessels. In the agreements it was provided that, upon the payment of various installments, Theodore Crane's Sons Company and, likewise, Valk and Murdock Company would assign to Fidelity Trust Company that proportion of their respective claims that the amounts paid would bear to the total amount of such claims. Fidelity Trust Company made payments to Theodore Crane's Sons Company in the sum of and received therefrom assignments of claim in the amount of $206,526.10, and made payments in the amount of $132,519.45 to and received from Valk and Murdock Company an assignment of its claim and all rights incident to the action filed in court on account thereof, Valk and Murdock Company writing off and charging to profit and loss, after the failure of the Trust Company, the balance of $10,263.48.

In return for the above-mentioned payments by Fidelity Trust Company the two notes given by A. S. Farwell to Fidelity Trust Company, one for $150,000 secured by a mortgage on the S. S. "James S. Whitney," and one for $200,000 secured by a mortgage on the S. S. "H. M. Whitney," were endorsed by the Acme and Whitney Steamship Corporations, and as additional security there was given to the Fidelity Trust Company by Acme Steamship Corporation a further bond of $200,000 secured by an additional
69 mortgage on the S. S. "James S. Whitney," and by Whitney Steamship Corporation a further bond of $150,000 secured by an additional mortgage on the S. S. "H. M. Whitney."

On September 28, 1920, the Fidelity Trust Company not having liquid funds with which to meet its current obligations was, together with its business and assets, taken over by the commissioner of banks for the Commonwealth of Massachusetts acting pursuant to the laws of the State. On March 26, 1921, Fidelity Trust Company, acting

through the commissioner of banks, agreed to sell and did on April 7th, 1921, after due approval by the Supreme Judicial Court of Massachusetts, sell, assign, and transfer to the Liberty Trust Company, the Intervenor herein, certain assets and property including the above-mentioned mortgages on the S. Ss. "James S." and "H. M. Whitney," made and given by A. S. Farwell and Acme and Whitney Steamship Corporations, the mortgage notes, and all right, title, and interest of Fidelity Trust Company in and to the above-mentioned judgment of Theodore A. Crane's Sons Company and the claim and lien of the Valk and Murdock Company.

30. Bartholomew L. Stafford and Robert E. Miller did not, either in their own names or in the names of Acme Steamship Company, or otherwise, file a copartnership income-tax return with the collector of internal revenue for either of the calendar years 1917, 1918, or 1919. Acme Steamship Corporation, Acme Operating Corporation, and Whitney Steamship Corporation severally filed with the collector of internal revenue income-tax returns for the years 1917 and 1918 and Acme Steamship Corporation for the year 1919, in which each of said corporations reported no income for the years mentioned.

No income-tax return was filed by Whitney Steamship Corporation for the year 1919. The Operating Corporation filed its income-tax return with the collector of internal revenue for the year 1919, setting out both substantial income and expenses, none of the items of which in any way related either to the S. S. "James S. Whitney" or the S. S. "H. M. Whitney" or to any matter pertaining to this cause; and further set out in said report the following:

Schedule K

No balance sheet for Jan. 1st, 1919, can be furnished, as at that date the books of account were not those of the Acme Operating Corp., but were kept as agents for the steamship corps. referred to in the attached letter.

B. L. STAFFORD, *President.*

ACME OPERATING CORPORATION,
11 BROADWAY, NEW YORK,
Feb. 14th, 1920.

The Acme Operating Corporation, which was incorporated Jan. 1918, in the State of New York, did no real business prior to May, 1919. Before that date the corp. acted as agents for the Whitney and the Acme Steamship Corps.

The Government requisitioned the boats and money on hand so that the Acme Operating Corp. received nothing for service
70 rendered, except office expense and not all of that. All claims against the Acme and Whitney Steamship Corps. were cancelled, as they had no money and no prospect of ever having any.

The stock of the Acme Operating Corp. has no par value, nor has it ever been traded in. All the stock is held by myself, by power of attorney, and no money or other form of payment has been made on it.

B. L. STAFFORD, *President.*

BLS/AF

Robert E. Miller, in his income-tax return for the calendar year 1917, reported: Name and address of employer, Acme Steamship Corporation, 11 Broadway; gross income, $7,500. And in his income-tax return for the calendar year 1918 reported: Occupation, president; name and address of employer, Acme Operating Corporation, 11 Broadway; gross income, $11,744.95.

Bartholomew L. Stafford, in his income-tax return for the calendar year 1917 reported: Occupation, steamship broker; name and address of employer, "in business for myself"; gross income, $9,321.84. And in his income-tax return for the calendar year 1918 reported: Occupation, steamship business, 11 Broadway, and gross income, $24,231.97.

31. At the time of the delivery of the S. S. "James S. Whitney" to the United States by the Acme Steamship Corporation she had on board coal of the value of $297.50, and at the time of her return by the defendant to Acme Steamship Corporation she had on board fuel and water of the value of $1,020.50 and stores and equipment of an inventory value of $3,540.34 less than at the time of her original delivery to defendant.

At the time of the delivery of the S. S. "H. M. Whitney" by Whitney Steamship Corporation to the United States she had on board coal of the value of $2,989.23, and at the time of her return by defendant to Whitney Steamship Corporation she had on board stores and equipment of an inventory value of $4,035.08 greater than at the time of her original delivery to defendant.

On each of said vessels the board had installed suitable radio equipment, and this equipment was, at the request of the respective owners of the vessels, delivered with the vessels. The value of this equipment at the time of delivery was in the case of each vessel $800.00.

32. At the time of the aforementioned requisitions in April, 1918, the American market value of the S. Ss. "James S. Whitney" and "H. M. Whitney," the vessels being in all respects staunch, strong, seaworthy, and in good repair, was, respectively, $544,000 and $500,000; the American market value of the vessels, in like condition and state of repair, in July, 1919, when they were by the defendant returned to their respective owners, Acme Steamship Corporation and Whitney Steamship Corporation, was, the S. S. "James S. Whitney" $482,000 and the S. S. "H. M. Whitney" $436,000.00.

33. During the year 1919, and subsequently, there were a number of conferences between the representatives of the Fidelity Trust

and of the Shipping Board looking toward a settlement of the claims of the several parties to the transactions involving the S. Ss. "James S. Whitney" and "H. M. Whitney." On November 21, 1919,
71 a formal proposition of settlement was jointly submitted to the board by "Acme Steamship Corporation, owner of S. S. 'James S. Whitney,'" "Whitney Steamship Corporation, owner of S. S. 'H. M. Whitney,'" and "Fidelity Trust Company, mortgagee," negotiations in respect to which continued through February, 1921, and for some time thereafter; but the proposition for settlement was finally rejected by the board.

During the course of negotiations and conferences between Messrs. R. E. Miller and Bartholomew L. Stafford, representing the several corporations and interests owned and controlled by them, and representatives of the Fidelity Trust Company and representatives of the board and Fleet Corporation, various records and figures were assembled and submitted and statements of account rendered from time to time by the parties; but owing to the widely scattered and enormous volume of documents incident to the transactions, complete figures and records were not assembled and available until some time during the year 1926, when, finally, under date of November 1, 1926, after the various figures and records, both of the board and of the several other interests involved, had been assembled, there was prepared by the general comptroller of the Fleet Corporation a final statement of account, and is in summary form as follows:

Items	Acme and Whitney Steamship Corporations Dr.	Cr.
Paid on account of S. S. James S. Whitney to Valk & Murdock Co	$8,200.25	
Paid for cost of repairs ordered by American Bureau of Shipping, April 19, 1918, S. S. H. M. Whitney	965.35	
Payment of freight on cargoes shipped for account of Acme and Whitney S. S. Corporations	703,560.33	
Payment of costs of discharging the cargoes from the S. Ss. James S. and H. M. Whitney, care and loading for shipment of such cargoes and various lots of freight assembled and stored in warehouses for shipment by the owners and agents of the vessels	159,800.10	
Paid for maintaining watchmen and crew on S. S. H. M. Whitney from July 8 to August 11, 1919, at the request and for the account of Whitney S. S. Corp	1,038.45	
Value of wireless equipment delivered with S. Ss. James S. and H. M. Whitney by the board to Acme and Whitney S. S. Corporations	1,600.00	
Stores, supplies, and equipment on board H. M. Whitney at the time of return by the board in excess of such stores and supplies at time of requisition	1,045.85	
Part payment to the board by Acme Operating Corp. through Equitable Trust Company for account of Acme and Whitney S. S. Corps. of cost of discharging cargoes from the S. Ss. James S. and H. M. Whitney, caring for and forwarding cargoes and freight stored in New York for shipment	----------	$187,000.00
Freight moneys collected by the board from shippers who had not paid the owners or agents of the vessels	----------	32,370.44

	Items	Acme and Whitney Steamship Corporations Dr.	Cr.
	Charter hire S. S. James S. Whitney, April 27, 1918, 6.30 p. m., to July 10, 1919, 7 a. m., the vessel being of 3,090 dwt. capacity and a speed of 14 knots, at $5.65 per dwt. per month	----------	$251,535.07
	Charter hire S. S. H. M. Whitney, April 29, 1918, 1 p. m., to July 8, 1918, 12.00 m., the vessel being of 3,230 dwt. capacity and speed of 12½ knots, at $5.15 per dwt. per month	----------	237,716.10
72	Amount found by boards of survey due to the owners by the board for repairs on the vessels at the time of return from requisition:		
	Account of S. S. James S. Whitney		42,884.48
	Account S. S. H. M. Whitney		44,822.36
	Stores, supplies, and equipment on board S. S. James S. Whitney at time of requisition in excess of such stores, supplies, and equipment at the time of her return		2,817.34
		$876,210.33	799,141.79

The above account is found to be correct.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover and it is ordered that its petition be dismissed. The court further decides that the intervenor herein is entitled to recover the sum of $129,299.76, with interest as stated below.

It is therefore ordered and adjudged that the intervenor recover of and from the United States the sum of one hundred twenty-nine thousand two hundred ninety-nine dollars and seventy-six cents ($129,299.76), with interest at the rate of six per cent per annum from October 1, 1919, to the date of judgment herein, February 8, 1932.

Opinion

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff bases its suit upon allegations which may in general terms be stated to be that the defendant has taken property belonging to the plaintiff by reason of which plaintiff seeks to recover just compensation. The property alleged to have been taken is an interest in two vessels acquired through charter parties executed to the plaintiff in the manner hereinafter set forth.

The parties to the action have made a stipulation as to the facts which is about 170 closely typewritten pages in length and which would fill about the same number of printed pages of the size ordinarily used in briefs. This statement has been somewhat condensed in the findings of fact, in which we have included everything we consider might be material. As stated in the stipulation and the findings, the facts seem extremely involved and complicated, but under the view which we take as to the law much of this matter is not material to a decision of the case.

The period of time involved in the case begins with October, 1917, when B. L. Stafford and R. E. Miller, as copartners, bought the steamships "James S. Whitney" and "H. M. Whitney," which were already subject to certain mortgages, borrowing considerable sums of money for the purpose, and executing contracts, or giving mortgages to secure the loans so obtained. It ends in July, 1919, when the Shipping Board, which had during the World War requisitioned these two vessels for war purposes, released them to the Acme Operating Corporation, plaintiff herein. In the meantime and in December, 1917, Stafford and Miller, together with other parties not financially interested but joined for the purpose of complying with the corporation laws of the State of New York, organized the
73 Acme Steamship Corporation, the Whitney Steamship Corporation, and the Acme Operating Corporation, and subsequently became owners of fifty per cent each of the stock of the three corporations, up to April 23, 1919, when Miller assigned all his stock in the Acme Operating Corporation to Stafford, or his nominee.

Almost immediately after the organization of these corporations through contracts executed between Miller and Stafford and the steamship corporations, "the equitable title" to the S. S. "James S. Whitney" was conveyed to the Acme Steamship Corporation and "the equitable title" to the "H. M. Whitney" to the Whitney Steamship Corporation. Thereafter the two corporations severally executed charter parties upon the vessels by which the control of the steamships was transferred back to the copartnership, and finally, on January 7, 1918, these charter parties were assigned to the plaintiff herein. The basis of plaintiff's suit, as we shall see later, is the interest in the two steamships derived through these charter parties, which interest is alleged to have been damaged or injured by the action of defendant in requisitioning the vessels in the manner hereinafter explained.

In order to understand fully upon what the plaintiff's claim is based, it is necessary to state the transactions in relations to the ships more in detail. The charter parties made by the two steamship companies to the copartnership of Miller and Stafford provided, among other things, "that the * * * owners agree to let and the * * * charterers agree to hire the said steamship from the time of delivery for about three months," and "that the charterers shall pay for the use and hire of the said vessel (46/6) forty-six shillings six pence British sterling per calendar month commencing on and from the day of her delivery," and also—

"That the owners shall have a lien upon all cargoes, and all subfreights for any amounts due under this charter, and the charterers to have a lien on the ship for all moneys paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once."

These charters were dated January 7, 1918, and were made by the respective steamship companies as agents for the owners thereof.

Immediately upon the execution of these charter parties, Miller and Stafford executed an assignment thereof to the Acme Operating Corporation, and it is upon this transfer and the provision above quoted with reference to the lien which the owners shall have that the plaintiff bases its case. Books were opened by the Acme Operating Corporation covering all transactions with respect to the two steamships by the copartnership of Miller and Stafford and the three corporations mentioned. All receipts and disbursements in relation to said vessels were consolidated and carried in a single set of books.

In the meantime the S. S. "James S. Whitney" was placed in the yards of Valk and Murdock to be enlarged, which was done at a cost of over $132,000, and the S. S. "H. M. Whitney" was enlarged by Crane's Sons Company at a cost of over $253,000, on account of which libels in rem were filed by these construction companies, and through court proceedings the two steamships were taken and held by United States marshals. While these vessels were respectively in the custody of United States marshals and about April 29,
74 1918, the Shipping Board, which was a department of the Government of the United States, took possession of the two vessels under a requisition order and did not finally release them until July, 1919.

After the Shipping Board had requisitioned the vessels and on December 4, 1918, there were executed nunc pro tunc, the one as of April 27, 1918, and the other as of April 28, 1918, charter parties (bare-boat form) on standard U. S. S. B. Charter Form No. 2, respectively, between the board and Acme Steamship Corporation, covering the S. S. "James S. Whitney," and between the board and Whitney Steamship Corporation, covering the S. S. "H. M. Whitney." With reference to these charters and all through the opinion the distinction must be observed between the Acme Steamship Corporation and the Acme Operating Corporation, plaintiff herein. In these charters there were a number of agreements made by the respective parties some of which involved the expenditure of large sums of money by the Shipping Board and all pertaining directly or indirectly to what should be done with the said vessels and cargoes for which Miller and Stafford had previously issued contracts of affreightment. The most important provision in this contract reads as follows:

"In consideration of the compensation provided and the other obligations assumed by the United States hereunder, the owner accepts this requisition charter in full satisfaction of any and all claims he has or may have against the United States arising out of the requisition and *accepts the compensation herein provided for as the just compensation required by law*, * * *." (Italics ours.)

Although the plaintiff was not named as a party to this contract, the defendant insists that plaintiff is bound thereby. The grounds for this contention will appear later on.

After the ships had been turned back, a controversy arose over a proper settlement by the board with the various parties having interests in these vessels. After long negotiations the comptroller of the Fleet Corporation made a final statement of the account of the Acme and Whitney Steamship Corporations with the board, from which it appeared that these corporations were indebted to the board under the contract on items amounting to $876,210.33, and that they were entitled to credit on items amounting to $799,141.79, leaving a balance in favor of the board as agent for the Government of $77,068.54, which we have found to be correct. It is obvious that if the provision of the charter party contract last above quoted is binding upon plaintiff (as we think it is for reasons hereinafter set forth), plaintiff can not recover herein. The defendant also contends that even if plaintiff is not bound by this provision it can not recover for several reasons, one of which is that in any event no property of the plaintiff was taken but at most plaintiff was merely frustrated in enforcing its liens, if it had any. These matters will next be taken up.

In order to properly consider plaintiff's case, it is necessary to state the claims made in its behalf so far as we consider they merit discussion. It should also be noted in this connection that plaintiff's suit is not based upon this contract or any of the numerous contracts executed by the parties in suit, but simply upon the claim that the Government had requisitioned certain of its property and that it was entitled to just compensation therefor. More specifically stated, the claim of the plaintiff is, as stated in argument by its counsel,
75 that under the provisions of the charter parties assigned to it[1] plaintiff had paid in advance to the Acme Steamship Corporation the sum of $295,705.07 and to the Whitney Steamship Corporation the sum of $249,151.74, which amounts were not earned under the charter parties assigned to it (plaintiff) and that it had a valid and subsisting lien against the Acme Steamship Corporation and the Whitney Steamship Corporation upon the respective steamships equal to such amounts at the time they were requisitioned, and also that at the time the vessels were returned to their owners the value thereof was much less than when they were originally requisitioned. The contention of the plaintiff is that by reason of its alleged lien upon the vessels it was entitled to just compensation for their seizure and that this just compensation would include depreciation in the market value of the vessels. The burden of proof is upon the plaintiff in the first instance, but the issues will be better understood when we state the defenses presented by the argument on behalf of the defendant. They are as follows:

(1) That defendant requisitioned nothing and took nothing from plaintiff for the reason that plaintiff was not entitled to possession of the vessels at the time they were requisitioned, or during any of the time defendant used them.

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[1] These charter parties must be distinguished from the charter parties executed with the Government December 4, 1918, and hereinabove referred to.

(2) That plaintiff made no advancements upon the vessels but simply paid out of money received on affreightment contracts, made before it received the assignment of the charter parties, certain amounts in connection with the operation of the vessels.

(3) That in no event could the plaintiff acquire a lien for any money advanced (if it did advance any) for the reason that it was bound by the contract which Miller and Stafford and the parties who conveyed the vessels made with the defendant as to what it should pay for the use of the vessels, the several corporations which Miller and Stafford organized, owned, and controlled being merely, as defendant alleges, different forms under which Miller and Stafford operated.

Some other defenses are set up by the defendant, but our conclusions with reference to those above stated are such that it will not be necessary to consider them.

The defense first stated will be first taken up, but these defenses are so intertwined that we shall not attempt to proceed with their discussion in a logical order.

Conceding for the sake of the argument that plaintiff had valid and subsisting liens upon and against the two vessels which were requisitioned, we think it can not be said that these liens were requisitioned or that the Government appropirated or used any interest which the plaintiff had in the two steamships. What the Government requisitioned and all that the Government requisitioned was the possession of the steamships, and the plaintiff did not have possession of them at the time they were taken over, but they were held by United States marshals as detailed above; nor would plaintiff have been entitled to possession if the Government had not taken them. Conceding for the sake of the argument that the plaintiff had an enforceable lien against the steamships by virtue of a
76 provision in the charter parties, the Government did not take over this lien, and if it in some way frustrated the enforcement of it in exercising its war powers the defendant is not liable by reason of such action. Had the defendant prevented the plaintiff from foreclosing a lien, a different case would have arisen, but we are not called upon to determine what the rule would have then been, for no such situation is presented by the facts in the case. If plaintiff actually had a lien on the vessels, it could have proceeded to foreclose it, and if it was then entitled to possession it may be, although we do not so decide, that the Government would be liable by reason of having taken from plaintiff this possession. But plaintiff at no time while the Government held possession of the vessels was entitled to possession by reason of its lien. It had merely the right to foreclose its lien, if it had one. Moreover, as we shall see later on, the contracts made with the Government, to which the plaintiff had assented, were such as to prevent the plaintiff's recovery herein. This makes it necessary to consider more particularly the contracts which had been entered into with reference to the two steamships.

A large number of parties were interested in the two steamships through transfers and contracts pertaining thereto. These parties were the plaintiff (the Acme Operating Corporation), the other two corporations organized by Stafford and Miller, the two trust companies which had made loans to enable Stafford and Miller to purchase the steamships and held mortgages thereon, the construction companies for whom United States marshals were holding the vessels under libel proceedings, the defendant, and others not necessary to mention, as we do not think their contracts had any bearing on the subject matter of the case. The transfers and contracts made under the direction of Miller and Stafford were so numerous and involved so many provisions that the reasonable limits of this opinion prevent all of them being set out. At this point it may be sufficient to say that by what appears to us to have been a jugglery back and forth between Miller and Stafford and the two steamship corporations created and controlled by them, the copartnership of Miller and Stafford, having acquired control of the steamships, transferred the title thereof to these corporations, finally had the charter parties executed back to themselves, and then assigned these charters to a corporation which they created and controlled, which is the plaintiff herein. After all this had been done, the construction companies who had rebuilt the vessels libeled them and seized them through court proceedings, and they were held by United States marshals when the Government requisitioned them. Following the requisitions, Miller and Stafford, representing the corporations owned and controlled by them, as well as the representatives of the consignors and owners of cargoes for the shipment of which upon the two steamships commitments, respectively, had been made, and the Trust Company entered into what is termed by the parties the contract of August 12, 1918, to which reference will hereinafter be made. This contract the plaintiff did not execute and claims it was not binding upon it, and it should be kept in mind that the construction liens upon the vessels in the end practically absorbed the whole of their value. It will be observed that the amount which the plaintiff paid out in connection with the vessels did not quite equal the amount which it
77 received from affreightment contracts, and the result of sustaining plaintiff's contention would be to enable the plaintiff to recover a very large amount from the Government for the requisition of the vessels at a time when plaintiff was not even entitled to the possession thereof and make it certain that the Trust Company would realize nothing upon its mortgages. In other words, if the claim of plaintiff is sustained, the manipulation of interests in the vessels made by Miller and Stafford would result in the plaintiff getting all of the assets now pertaining to the vessels without becoming liable for any of the just obligations against the ships in the way of mortgages. That this would be grossly inequitable is quite apparent. We will next determine whether the law will support such a conclusion.

Assuming for the purposes of the argument only that plaintiff acquired a valid and subsisting lien upon the vessels through the assignment of the charter parties, we think the principles laid down by the Supreme Court in the cases of A. W. Duckett & Co. v. United States (266 U. S. 149, 152), and Omnia Commercial Co. v. United States (261 U. S. 502) prevent any recovery based thereon.

In A. W. Duckett & Co. v. United States, supra, the Supreme Court referred to the decision in Omnia Commercial Co. v. United States, supra, which was a case wherein the Government had requisitioned the entire product of a steel company for a year and thereby made it impossible for the Omnia Company to enforce a contract for a large quantity of steel plate, which contract was made with the steel company prior to the requisition. The court held in the Omnia case that the contract was not taken but at most merely frustrated by the Government in the exercise of its war powers, and in commenting on the situation in the Omnia case the Supreme Court said in the opinion in the Duckett case supra:

"The contract was no part of the res taken and whatever might be the collateral consequences of the appropriation liability for them was not an incident of the Government's act."

This language is peculiarly appropriate to the circumstances of the case at bar.

Further on in the opinion, in connection with the intervenor's claim, we shall call attention to some special features of the Duckett case, supra.

The defendant does not even concede that plaintiff had as against the United States a valid lien on the steamships, but it is insisted by counsel in argument that the Acme Operating Corporation was merely the Acme Steamship Corporation and the Whitney Steamship Corporation under a different name and guise, that all of these corporations were controlled absolutely by Stafford and Miller, who owned all the stock therein and manipulated them at will. We think this position well taken.

That the Acme Operating Corporation was simply another name under which Miller and Stafford and the other two corporations organized by them carried on the business of owning and operating the vessels is conclusively shown by the following matters which appear in the findings of fact:

(1) Miller and Stafford each owned fifty per cent of all of the capital stock of the three corporations. Miller was the president of each corporation and Stafford the treasurer down to the time
78 when Miller assigned his stock to Stafford's nominee, which was April 23, 1919, and thereafter Stafford was in sole control by reason of himself and his nominee holding all of the stock.

(2) While the steamship companies owned the vessels separately and the operating company merely had the right to control the vessels through a charter party contract, all three of the corporations were formed at the same time and with but one purpose—that

of putting the ownership and operation of the two steamships nominally under corporate ownership and control, the corporations being actually controlled by Miller and Stafford.

(3) The manner in which the Acme Operating Corporation kept its books with reference to accounts in the names of the two steamships and the Acme Steamship Corporation and the Whitney Steamship Corporation, respectively, the manner in which the correspondence was conducted on behalf of the Operating Corporation, and the manner in which contracts of affreightment were entered into by the several corporations which Miller and Stafford had created, all tends to show that they were in fact operated as one concern.

(4) The ships were chartered by the Acme and Whitney Steamship Corporations to the plaintiff for a mere nominal sum, namely, forty-six shillings six pence British sterling (46/6) each per month. This sum is so small that it tends to show that it was never intended that the charter parties should be put into effect.

In United States v. Reading Co. (253 U. S. 26, 62), while the court held that the mere fact of ownership by the same group of stock in several corporations is not enough in itself to justify considering the two corporations as one, the court said:

"* * * where such ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality or department of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist and will deal with them as the justice of the case may require."

The evidence shows that the Acme Operating Corporation received no money except that paid upon affreightment contracts made either by the Steamship Corporations or itself after it had acquired the charter parties under which it bases its suit. The books show that an account was kept in which the amount received on account of each steamship was placed on the credit side and all sums paid on account of each steamship on the debit side of the ledger.

No charge or credit in relation to charter hire by defendant is included in any item or appears on the books of the Acme Operating Corporation. The charter parties made a number of provisions for certain payments by each party, which would have resulted in debits and credits if the charter parties were carried out accordingly, but there is nothing in the evidence to show that any of these provisions were carried into effect.

It is true that the powers and liabilities of some of these entities, if they may be called such, were varied by the legal trappings with which they were clothed. But they were all created for one purpose, used for that purpose, and so far as matters vital to the case at bar are concerned these legal technicalities do not, in our judg-
79 ment affect the situation. It is possible that no one of the matters which we have mentioned would be sufficient by itself

and alone to show the identity of these different concerns, but all the evidence tends in the same direction and as a whole abundantly satisfies us that these corporations were mere puppets of Miller and Stafford and moved in accordance with the manner in which they pulled the strings.

In the case of Luckenbach S. S. Co. v. W. R. Grace & Co. (267 Fed. 676, 681), where the identity of the corporations was if anything less clearly established than in the instant case, it was said:

"For all practical purposes the two concerns are one, and it would be unconscionable to allow the owner of this fleet of steamers * * * to escape liability because it had turned them over a year before to a $10,000 corporation, which is simply itself in another form."

In this case, we think, it would be unconscionable to permit the plaintiff to recover when it derived any rights that it possessed from another corporation with which it was practically identical and which could not recover. In fact, there are no equities upon which the case for plaintiff can rest. Under the contract executed with the steamship corporations and the transactions as carried out in accordance therewith, an indebtedness arose in favor of the Government instead of against it.

Holding as we do that the steamship corporations and the Operating Corporation, plaintiff herein, were merely masks behind which Miller and Stafford operated, the contract made with the Government by the steamship corporations, which by its terms was a settlement of all claims against the Government for the requisition of the vessels or the use of them, was binding alike on all of these dummies which Miller and Stafford had set up and prevents a recovery by the plaintiff herein. This holding makes it unnecessary to consider many other objections urged against the recovery of plaintiff which would otherwise demand attention.

In this connection it should also be noted that on April 23, 1919, contracts were executed between the Operating Corporation on one side and the Acme Steamship Corporation and the Whitney Steamship Corporation on the other, containing provisions that released the steamship corporations from any and all liability arising out of any charter parties made with the Acme Operating Corporation, or on account of any improvements or alterations made on the vessels by the Operating Corporation, or Miller and Stafford, or by reason of any moneys expended on account of the vessels in any manner whatever, the release to operate against the vessels as well as the parties and assigning to the steamship corporations any claims which the Operating Corporation (plaintiff) might have had against the vessels, or against the Government by reason of taking over the vessels, or for damages or otherwise.

The plaintiff also claims that the vessels were not in good condition when they were returned by the Government and that a considerable sum had to be expended in repairing them, the amount of which it seeks to recover. We do not think the plaintiff is entitled

to recover on this branch of the case. In the first place, it appears that the intervenor paid out the money for reconditioning the vessels as will appear further on in the opinion and in any event the Government settled with Miller and Stafford and the corporations which nominally owned the steamships for the amount necessary to recondition them and under the principles laid down above the plaintiff was bound by this settlement.

A question also arises as to whether the court has jurisdiction of plaintiff's case under the provisions of section 2 of the suits in admiralty act, which section has been held to grant exclusive jurisdiction to the district courts in cases where merchant vessels have been requisitioned by the Government and the Government subsequently entered into a contract for the operation thereof under what is known as a requisition charter. (See Matson Navigation Co. v. United States, 284 U. S.—, decided by the Supreme Court January 4, 1932.)

The case for plaintiff has been presented by its counsel on the theory that plaintiff had entered into a charter party not with the Government but with the owners of the steamships, acquired a lien thereon by virtue of provisions in the contract, and that its rights under the lien were injured by virtue of the Government's requisition proceedings. We have held, however, that the evidence showed that plaintiff was bound by a contract which was made by other parties with the Government and which precluded any recovery by the plaintiff. This contract included, among other provisions, a charter party of the requisitioned vessels. If a judgment had been sought by the plaintiff under the provisions of this charter, it may be that we would have no jurisdiction of the case to determine it upon its merits; but we do not hold that the plaintiff is entitled to a recovery under any contract or charter made with the Government. On the contrary, we have held on the merits of the case that the contract made with the Government prevents any recovery against the defendant and that this is a sufficient reason for dismissing the petition. If we should also hold that the charter party entered into with the Government and executed nominally on behalf of the steamship companies is involved in plaintiff's case and that by reason thereof the court has no jurisdiction to act on plaintiff's petition, the same result would follow and the same order be made. We conclude therefore that it is not necessary to enter in the record more than our conclusion that plaintiff's petition should be dismissed and a judgment carrying this determination into effect.

The claim of the intervenor

In the opinion on the case of the plaintiff we have shown that the Fidelity Trust Company had prior to the requisitioning of the steamships acquired liens thereon consisting of a mortgage on the S. S. "J. S. Whitney" to secure the payment of a note for $150,000 which matured April 30, 1918, and a mortgage upon the S. S. "H. M. Whitney" to secure the payment of a note to it for $200,000

which matured June 4, 1918. In addition to the mortgages to the Fidelity Trust Company, the "J. S. Whitney" was subject to the lien of the Valk and Murdock Company for repairs in the amount of $132,509.45, and the "H. M. Whitney" was subject to the lien of the Theodore A. Crane's Sons Company for repairs in the amount of $253,640.33. The lien of the Valk and Murdock Company in whole and the lien of Crane's Sons Company in part were acquired by the Trust Company through purchase and the Trust Company through contract with the plaintiff took over the vessels, paid for
81 repairs on them, and operated them in an attempt to recoup its investments. Neither the mortgages nor the liens were ever paid and the market price of the vessels so decreased that the liens were in excess of their value. Financial difficulties beset the Trust Company and it failed. Its assets passed under the control of the commissioner of banks for the Commonwealth of Massachusetts, and while being so controlled were sold to the Liberty Trust Company, intervenor herein. This sale included the mortgages and notes above described and the interest which the Fidelity Trust Company had at the time in the liens of the construction companies above mentioned, which had, as set forth above, repaired and changed the vessels. This sale or assignment was not of such a nature as would prevent this court from taking jurisdiction of the claim of the intervenor.

The defendant, however, sets up the plea that the action of the intervenor is barred by the statute of limitations. This plea is based upon the proposition that the statute began to run at the time when the vessels were turned back by the Government. If this proposition is well founded, the plea would have to be sustained, as the intervenor's petition was not filed until February 4, 1927. But we think that in this case the statute did not begin to run against the claim of the intervenor until it was rejected by the Shipping Board.

The act under which the steamships involved in this case were requisitioned (act of June 15, 1917, c. 29, 40 Stat. 182) provided in substance that the President should fix the amount of just compensation to be received by the party whose property had been requisitioned, and that if the person entitled to compensation was not satisfied with the amount allowed he was to be paid seventy-five per cent of such amount and be entitled to sue the United States for the balance. By Executive order the President delegated the powers the act conferred upon him to the Shipping Board. The claim of the intervenor was first presented to the board in 1919, and negotiations took place between the representatives of the Fidelity Trust Company and the board with reference to a settlement of the claim. The board took no final action on the claim until sometime subsequent to February, 1921, when the claim was rejected. It will thus appear that the petition of the intervenor was filed within six years from the date of the rejection of its claim by the board. There is nothing in the evidence to show that the intervenor was guilty of any un-

reasonable delay which postponed the final decision of its claim, and, so far as the effect of the statute of limitations is concerned, the instant case is controlled by the decision in Smith v. United States (67 C. Cls. 182), wherein the construction of the statute bearing thereon is discussed at length, and under a quite similar state of facts it was held that the action was not barred by the statute of limitations.

The question of whether the intervenor is entitled to recover on the merits of its case is a novel and difficult one. As a general rule where a third party takes possession of personal or chattel property and converts it to his own use, he becomes liable for the value of the property to another party having a mortgage thereon. But the circumstances of the instant case are peculiar and necessitate the determination of a new principle for which we find no direct precedents in the authorities.

82 The intervenor rests its case largely on the ground that the mortgages were executed in Massachusetts, and insists that under the Massachusetts law the Trust Company from which it derived its rights held the legal title to the vessels, and that therefore, when the defendant took over the vessels it became responsible for any depreciation in their value. It is also insisted on behalf of the intervenor that a party who causes damage to a lien holder by preventing the foreclosure of a lien, or by causing damage to the property to which the lien attaches, or depreciation in its value, becomes liable in damages. But we need not determine just how far these rules would apply in ordinary cases where the only persons who had rights in the property involved were the mortgagor, the mortgagee, and a third party, for that is not the case before us. Nor need we consider what the effect would be in such cases under the Massachusetts rule where a third party undertook to appropriate and claim title to the property mortgaged, for, we think, it is not controlling in the case at bar. It should be especially noted that the Government did not take the titles to the steamships. It left the titles where they were before. What it took was possession of the ships, and it took this possession not from the Trust Company but from the United States marshals who respectively had custody of the vessels. The Trust Company at the time not only was not in possession of the ships but it was not even entitled to possession of the ships and did not become entitled thereto until after the Government had released the ships and the Trust Company had taken up the construction liens under which the United States marshals had previously held possession. It is urged in argument on behalf of the intervenor that it was useless for the Trust Company to foreclose its liens, because it could not take possession from the Government. It is true that the Government took possession of the ships shortly before the notes of the Trust Company became due and that the Trust Company could not obtain possession thereof until the Government had released its requisition, but it does not follow, in our opinion, that it would have been useless for the Trust

Company to foreclose its liens and take such other proceedings as were necessary for it to obtain the right to possession of the ships when they were released from Government control. That there was nothing to prevent the Trust Company from taking the proper proceedings to establish its right to possession of the ships as against all parties except the defendant, is quite evident; and this, we think, is what it should have done to protect its rights. Had it done so, it then would have been in position to plead that but for defendant's requisition it would be in possession of the ships, that the Government was taking the possession of the ships away from it, and it was being deprived thereof by the Government's action. It might then have been argued that the Government should be required to pay just compensation for depriving the Trust Company of this possession. But as the Trust Company was neither in possession of the ships nor entitled to have possession of the ships at the time the Government requisitioned them, we think it took nothing from the Trust Company thereby. It will be observed that at no time while the Government held possession of the ships was the Trust Company entitled to possession thereof if the Government released
83 them. We think, therefore, it can not be said that the Government by taking possession of the ships and holding them for a limited time deprived the Trust Company of anything, and, consequently, the intervenor has derived from the Trust Company no right to receive compensation for this action.

It may be said that the defendant, by taking possession of the vessels, had converted them to its own use for the time being at least and therefore the Trust Company or its successors were entitled to recover for such conversion. But there are numerous cases which hold that an action for trover or conversion can not be maintained unless the plaintiff not only had title, general or special, but also either the right of immediate possession or was in the actual possession of the property and was wrongfully deprived thereof by the defendant. So also it has been held that an action in trover or for conversion can not be maintained by a mortgagee unless he has possession or a right to possession of the mortgaged property. (See 11 C. J. 602, and the numerous cases cited under note 96.)

It should be especially kept in mind that the intervenor does not bring this suit to recover the value of the use of the vessels during the time that the Government held possession. What it sues for is depreciation in their market value and for injury to their condition caused by use. It would seem that as the United States marshals held possession of the vessels at the time the Government took them over, if anyone was entitled to recover on account of the Government having taken and held possession of the vessels, it would be the United States marshals and not the intervenor. But, as we have observed above, there is no suit brought for the value of the use of the vessels while the Government held them, and it is not necessary for us to determine whether such a suit could be main-

tained. What we have here is an action for depreciation in the market value of the vessels during the time that the Government held them, and so far as this action is concerned, we think, the intervenor at least is not entitled to maintain it for the reason that at that time it was not entitled to possession.

No one, we think, would claim that if the original mortgagors had kept possession of the vessels during the same period the Government held them, the mortgagors would be liable for the amount the vessels had depreciated in market value in addition to the mortgage debt. Conceding for the sake of the argument and for that purpose only that if some person had wrongfully taken from the mortgagors, or from the United States marshals, the possession of the vessels he would be liable for the depreciation thereof during the time he held them it still must be said that we have no such case here. The Government did not wrongfully take possession of the vessels. On the contrary, it took possession rightfully under the statute and under the contract which it made with the mortgagors. When it took this possession, either from the mortgagors or from the United States marshals, it took over the rights of the party who had theretofore been entitled to possession, and as far as the mortgagee was concerned it obtained the same rights by virtue of the statute which had been held by the party from whom the possession was taken. The original mortgagors, had they been in possession of the vessels at the time, could have leased them to the Government and the Government would in such circumstances be no more liable for
84 damages on account of depreciation in the market value of the vessels than would the mortgagors themselves. We think the same rule applied when the vessels were taken from the United States marshals, who had the right of possession against everyone except the Government and could not be held liable for depreciation in value of the vessels during the time they were so held in custody, and for this reason also the intervenor is not entitled to recover on this branch of its claim.

The claim of the intervenor for compensation on account of the vessels being returned in a damaged condition appears to us to stand on a different basis. We think it is clear that the defendant was liable to someone for any damage done to the vessels themselves. We do not understand counsel for defendant to dispute this general statement, but they insist that pursuant to a contract with the mortgagors the amount of damage to the vessels was agreed upon and the mortgagors given credit therefor in a settlement had with them. But we do not think this settlement disposes of the claim of the intervenor. The defendant acquired no higher right than the mortgagors could convey by contract, but the mortgagors could not convey or release any of the Trust Company's rights in the property. That was something which only the Trust Company itself could do, and although the mortgagee may not be in possession or entitled to immediate possession he may bring an action in damages for an injury to his interest in the mortgaged property. (See Adams & Frederick

Co. v. South Omaha National Bank, 123 Fed. 641, and O'Brien v. Miller, 117 Fed. 1000.) It is true that this rule only applies where possession is wrongfully taken and the property converted to the use of the wrongdoer. While the defendant did not wrongfully take possession of the vessels but took them pursuant to its war powers and under statute, it would still, as we think, be liable to pay just compensation therefor under the same principles as were the basis of the decisions last above cited. We have not undertaken, however, to determine whether these principles might in any case enable a mortgagee to recover for a depreciation in market value of the mortgaged property where a third party took possession of it temporarily and subsequently turned it back, for, we think, in any event the intervenor is not entitled to recover on this ground. But the injury to the vessels themselves was an injury to the res upon which it held a mortgage, and for such an injury, we think, the Government was liable. It is true that it gave credit to the mortgagors for the amount which the board of survey found was reasonable to pay to recondition the vessels, but, as we have heretofore shown, the mortgagors could not bind the intervenor by such a contract, and it is not a protection to the defendant. In this connection it ought to be said that a claim for damages on account of the condition in which the ships were returned is not specifically pleaded in the intervenor's petition. The intervenor has however in its petition a broad and sweeping prayer for general relief which we think is sufficient to cover this claim under the liberal rules of pleading prevailing in this court, and it should be observed in this connection that this matter is specifically argued both by the intervenor and counsel for defendant without any objection being made on account of the indefinite nature of the pleadings or motion for a more specific statement.

There remains a question as to the sufficiency of the evidence to support this claim of the intervenor. There is no direct evi-
85 dence that the amount which the intervenor seeks to recover was actually necessary to put the vessels in as good repair and condition as they were when the Government took them over, but no question is raised but what the vessels were in good condition when the Government took them. In fact, they were right out of the yards of the construction companies which had been making them over. As before stated, the mortgagors and the Shipping Board entered into a contract whereby the Shipping Board was to pay a certain amount for reconditioning each of the two vessels respectively, as fixed by the board of survey. The Government could hardly dispute that it would require at least the amount fixed by the board of survey to recondition the vessels, and this amount constitutes the greater portion of the intervenor's claim. But the actual payment for these repairs was made by the Trust Company, together with other sums paid for further reconditioning of the vessels. So far as these amounts are concerned, the Government merely credited the mortgagors with the total amount agreed upon and made no payment. It is true that the stipulation shows that the

Trust Company charged the amount so paid to the Acme and Whitney Steamship Corporations, but we think there is a reason for this in that the mortgagors, who had consented to the chartering of the vessels to the Government, might also be liable for this claim. We have already stated that we think the fact that the board of survey fixed a certain amount for the reconditioning of the vessels was sufficient to show that at least that amount was required to recondition the vessels, and while there is no direct evidence with reference to the other sums expended by the Trust Company for the same purpose we think it would be unreasonable to suppose or believe, when the liens of the construction companies and of the Trust Company so nearly approached the whole value of the vessels, that the Trust Company would expend additional sums on them if it was not reasonably necessary to put them in proper condition. The evidence shows that the Fidelity Trust Company advanced and paid $55,377.26 for sundry services and materials in connection with the S. S. "James S. Whitney" after it was delivered by the Shipping Board, and also after the delivery of the S. S. "H. M. Whitney" the Trust Company paid for sundry services and materials in connection therewith $81,087.50, making a total paid on the two steamships of $136,464.76. The various items which made up these two expenditures all appear to be necessary expenses in reconditioning the ships except a total of $7,165 expended for lifeboats. Deducting this amount, there was expended by the Trust Company for reconditioning the ships $129,299.76, which we think the intervenor is entitled to recover together with interest from October 1, 1919. Judgment will be rendered accordingly in favor of the intervenor for that amount and dismissing the plaintiff's petition.

WILLIAMS, Judge; LITTLETON, Judge; and BOOTH, Chief Justice; concur.

WHALEY, Judge, took no part in the decision of this case on account of illness.

86 VIII. *Judgment*

At a Court of Claims held in the city of Washington on the 8th day of February, A. D. 1932, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and it is ordered that its petition be dismissed. The court further decides that the intervenor herein is entitled to recover.

It is therefore ordered and adjudged that the intervenor, Liberty Trust Company, recover of and from the United States the sum of one hundred twenty-nine thousand two hundred ninety-nine dollars and seventy-six cents ($129,299.76), with interest at the rate of six per cent per annum from October 1, 1919, to the date of judgment herein, February 8, 1932.

IX. *Proceedings after entry of judgment*

On April 7, 1932, the plaintiff filed a motion for a new trial.

On April 7, 1932, the defendant filed a motion for a new trial with respect to the intervenor, Liberty Trust Company.

On June 15, 1932, the court overruled the plaintiff's and the defendant's motions for a new trial.

87 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1933

SUPREME COURT OF THE UNITED STATES

Order allowing certiorari

Filed October 17, 1932

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1932